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In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY FIELDS, Acting Warden, Joseph Harp Correctional Center, and THE STATE OF OKLAHOMA,
Petitioners,

vs.

PAUL M.*,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1982

* See footnote on page -ii- for explanation of the parties.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal district court should require the re-exhaustion of state remedies when a petitioner brings a claim for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 that has been presented to, and rejected by, the state courts, but during the course of litigation of the Section 2254 claim, and almost two (2) years prior to any hearings thereon, the state courts overrule prior case law that had barred petitioner's claims before the state courts and establish state procedures for addressing such claims before the state courts through Oklahoma's Post-Conviction Procedure Act.

2. Whether the finding by the federal District Court and Court of Appeals that a state prisoner's voluntary statement was made in absence of an informed waiver of that prisoner's right to remain silent when the prisoner, who was within five (5) days of becoming eighteen (18) years old when he was questioned, had been read his *Miranda* warnings, was interrogated by the police at a police station in the presence of the prisoner's mother during daytime hours, and was not subjected to unreasonably prolonged, abusive or threatening questioning by the police representatives, was contrary to legal principles established by this Court for evaluating such statements and clearly erroneous as a matter of fact based upon the record and therefore appropriate for review by this Court as an exercise of its supervisory powers over the inferior federal courts.

3. Whether a voluntary statement made to police representatives that was made in absence of an informed waiver of the declarant's right to remain silent is constitutionally barred from use as State's evidence at a hearing held for the sole purpose of determining whether or not the jurisdiction of the juvenile division of the District Court

should be transferred to the adult division of that court for prosecution of criminal charges against this person.

4. Whether a voluntary statement made to police representatives in absence of an informed waiver of the declarant's right to remain silent is constitutionally barred from use as State's evidence at a hearing held ten (10) years after the declarant had entered a counselled, knowing and voluntary plea of guilty to the crime of murder, the sole purpose of said hearing being to determine whether or not the jurisdiction of the juvenile division of an Oklahoma District Court would have been transferred to the adult division of that court.

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*Paul M. is a person who pled guilty to the charge of Murder and was sentenced to serve life imprisonment. Counsel for Mr. M. informs your Petitioners that if this Court does not grant relief to Petitioners, Mr. M. intends to seek to have all records of his conviction expunged from the records of this Court. Petitioners believe they bring important, meritorious claims in this petition but recognize the discretion of this Court in entertaining even important, meritorious claims. Accordingly, Petitioners will only refer to your Respondent as "Mr. M." in order to save this Court from a motion for expungement by Mr. M. at some later date. This should in no manner be taken as a concession by these Petitioners that Paul M. should properly have been treated as a juvenile in reference to this murder.

Mr. M. originally brought his petition for habeas corpus against Richard Crisp, who was at that time Warden of the Oklahoma State Penitentiary, wherein Paul M. was incarcerated. In the course of the litigation, Mr. M. was eventually transferred to another facility. Mr. M. was released from state custody on March 25, 1981, upon the writ of habeas corpus directed to the Warden of Oklahoma's Joseph Harp Correctional Center. The Acting Warden of that institution is Larry Fields. See Rule 25, F.R.Civ.P., 28 U.S.C.A.. The State of Oklahoma is one of several sovereign states forming the Federal Union whose judgment and sentence was vacated by the courts below. Your Petitioners will be referred to collectively as "the State" herein.

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No. .....

In the
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LARRY FIELDS, Acting Warden, Joseph Harp Correctional Center, and THE STATE OF OKLAHOMA,
Petitioners,

vs.

PAUL M.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit and that court's opinion on rehearing are published *sub nom., Crisp* v. [*M*], 668 F.2d 1127 (10th Cir. 1981), *reh. denied,* 668 F.2d 1136 (1982).

JURISDICTION

Judgment in accordance with the opinion of the Court of Appeals was entered on September 29, 1981. A timely petition for rehearing was filed and final judgment of the Court of Appeals was entered in accordance with the court's opinion on rehearing on February 16, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 21.1(f), Revised Rules of the Supreme Court of the United States, the constitutional and statutory provisions involved are set forth verbatim in Appendix A to this petition. The constitutional and statutory provisions involved are as follows:

U.S. Const. amend. V
U.S. Const. amend. XIV, § 1

28 U.S.C. § 1254
28 U.S.C. § 2254

10 O.S. Supp. 1970, § 1101(a), (d), (e), (f)
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22 O.S. Supp. 1970, § 1051
22 O.S. Supp. 1969, § 1076
22 O.S. 1971, § 1080
22 O.S. 1971, § 1081
22 O.S. 1971, § 1086

STATEMENT OF THE CASE

On October 22, 1970, the State of Oklahoma, acting through the District Attorney for Oklahoma County, Oklahoma, filed a felony Information against Paul M. and one Earl Van Denton, charging, among other facts, that on October 1, 1970, within the County of Oklahoma County, Mr. M. and Van Denton committed the crime of Murder by beating one Willie Droke about the head and face with a telephone receiver. On April 13, 1971, Paul M. appeared with counsel in the District Court for Oklahoma County, withdrew his previous plea of not guilty and knowingly and voluntarily pled guilty to that crime. In entering the plea Mr. M. was asked if it was entered of his own free will and Paul M. reportedly replied:

> "Yes, but we did it with a tire tool instead of a telephone receiver." (Deposition of Theus, [*M*] v. *Crisp*, E.D. Okl. No. 75-249-C, filed July 14, 1980).

See also, Appendix G, Plea of Guilty: Summary of Facts, *State* v. [*M*], No. CRF-70-3097 (D.C. Okl.Co.), ¶ 12.

Mr. M.'s plea was accepted by the trial court and, as a consequence of the plea, Mr. M. was sentenced on that date to Life Imprisonment. Mr. M. did not exercise his statutory right to appeal the conviction on his guilty plea. See 22 O.S. Supp. 1970, § 1051. See also 22 O.S. Supp. 1969, § 1076.

Prior to the entry of the plea, Mr. M. was questioned by the police on November 5, 1970, after having been brought back from California. Present at the questioning session, commencing at 10:35 a.m., were Paul M., M.'s mother, hereinafter referred to as "May M.," and two police officers, Messrs. Richard Mullins and Bill Baldwin. Prior

to the commencement of questioning, Mr. M. executed an "Interrogation; Advice of Rights" form. (Reproduced as Appendix E hereof.) An oral conversation then ensued between Paul M. and the policemen in the presence of May M. At about 1:00 p.m. a typist was brought in and the question/answer session that followed was simultaneously recorded by a typist. (Reproduced at length as Appendix F.) Paul M. told the police:

> "Q. Mr. [M.], would you explain in your own words, from the beginning reference what actually happened?
>
> "A. At first me and willie rented the motel room, at the Alamo Plaza motel, and we went over there and had a few drinks of beer and vodka, and they gave me some kind of marijuana and put some white powder in my beer. We went and picked up Earl Van Denton at his house, in Willie Droke's car. We went and took Earl back to the motel and started drinking beer, vodka too. Then I passed out about an hour after I was over there. Him and Willie Droke were having some kind of sex affair, and I had passed out, WILLIE and EARL left, Willie came back to the motel and woke me up, and told me that he and Earl hadhad sex together. Then we got up out of bed and he took me home, and thensaid that he had to go to work.
>
> "He asked me to meet him at about 6:30pm that night, at my house. He had another kid in the car by the name of Daniel, and then we went back over to the Alamo Plaza Motel, and started drinking again. Willie and Daniel were having another sex affair, and then about 10:00p.m. we took Daniel home and went over and picked Earl up. We got to the Alamo Plaza and started drinking again, I don't remember the exact date but it was the last part of September. We had stopped and gotten Beer and fritos before going

back to the motel. We got back over there and Willie Droke gave me some pills, every time I would open a can of beer and take a drink out of it, I'd set it down and go to the restroom and when I'd come back half of it would be gone and it would taste funny. Willie Droke said that he had better not catch my brother Charles out on the streets, because Rocky had told him something about him. Then we started arguing and I hit Willie Droke on the forehead with my fist. I got back up to get a drink and he kicked me and then he hit me with his hand, then Willie got up and grabbed the phone, to call the switchboard, after Earl had hit him with a 7-up bottle approximately 10 times in the head and face, Willie was bleeding, in the back of the head and EARL had hit him with his fist, and Willie's eye was swollen up. Earl tore the telephone XXXXXXXXXXXXXXXXXXXXXX causing the wire to be disconnected. Then Willie and Earl started struggling and Willie's head was bleeding and I had given him a towel to put over his head. Earl told him to get in the car, and we walked out of the motel and Willie was in front, Earl behind Willie and I was behind Earl. Willie walked around and got in and got into the right side of the car into the rear seat with a towel over his head, this was Willie's own car that they got into, which was parked right beside the room at the motel.

"EARL drove the car from the motel, and I was sitting in the front seat, then EARL said let's tie him up, Willie's head was leaning back with a towel wrapped around his head. Then we took some road to Blanchard, I had passed out and we were in some kind of a country in Blanchard, and EARL thought that Willie had a gun in the back of the trunk. We parked the car then Earl got out to check to see if Willie had a gun in the trunk, he came back with a tire tool and a shovel. I was sitting inside the car

and willie was still in the back seat. Then Earl put the tire tool in the front floorboard, then he took the tire tool back of the car, and laid the shovel down beside the car took the tire tool aroundon Willie Droke's side and told Willie to get out of the car, and Willie got out of the car and I got out of the car, and when Willie got out of the car he was standing up, Earl hit him with a tire tool in the back of the head about three or four times, knocking him down. It was a single lug tire tool, then Earl, after Willie had fallen down had hit him with the shovel on the back of the head twice. Willie got up and ran around to the driver's side of the car got inside, EARL came around, Willie got back out of the car, he didn't get very far past the back of the car, and Willie had fallen down, then Earl got back in the car and started it up, did about 30 mph making a 'U' turn, and Willie Droke said 'he is going to run over us'. I had step back beside Willie who was laying down, and he stopped the car in front of me and Willie, and Earl got out of the car, took the shovel and hit Willie one time on the side of the head and he was still breathing, being Willie, and I had passed out twice out there, and Earl looked at me as if he were going to hit me with the tire tool. Earl got the shovel and started digging, and I dug some and then Earl started digging grave, pretty well deep, and then we drug his body over to the grave, put him in there and he had a cloth or something over his face, Earl took Willie's shirt, socks, and shoes off, no he did' not take his shirt off, and then started to cover him up. He was still breathing and I told Earl this. After he was covered up he started to get out of the grave, I could see some dirt moving as if he were trying to get out. Earl had took car, and run over the grave about 15 times, and then we drove back to Oklahoma City, Earl drove the car. Before we drove back to Oklahoma City Earl

threw the tire tool and the shovel into what I believed was a pond about 3 blocks from the grave. I was facing north and earl got the tire tool up as if he were going to throw it, I moved out of the way and then he threw it into the pond, it didn't lack much of hitting me. And I thought that he was going to hit me with the tire tool. Earl drove the car back to Oklahoma City, parked it outside on the street at the Alamo Plaza Motel, took the key to the room back into the room, and then we left and got a ride on Agnew from Falvial Moore, this was about 8:00am in the morning. I went home and then they took Earl HOme. Earl kept Willie's camera, and he must have taken his watch and ring.

"I later left Oklahoma City and went to California."

On May 28, 1975, Mr. M., through counsel, filed an application for post-conviction relief pursuant to Oklahoma's Post-Conviction Procedure Act, 22 O.S. 1971, § 1080, *et seq.* In that application Paul M. stated that he was born on November 10, 1952; that he was therefore only seventeen (17) years of age when the crime was committed; that the law in effect at the time he was convicted, 10 O.S. Supp. 1970, § 1101(a), defined males as juveniles until sixteen (16) years of age while it defined females as juveniles until eighteen (18) years of age and that he was therefore a victim of sex-based discrimination. He contended that the adult division of the District Court would not have had jurisdiction to try him if he had been a female absent his certification for adult trial. Although the record reflects that this was Mr. M's second application for post-conviction relief, Compare 22 O.S. 1971, § 1086, and *Cf. Murch* v. *Mottram,* 409 U.S. 41 (1972), the Court entertained the application on the merits. The Oklahoma Dis-

trict Court denied relief by order dated June 5, 1975. See *State* v. [*M*], (Unpublished) No. CRF-70-3097 (D.C. Okl. Co.) (Reproduced at Appendix H). Mr. M. appealed to the Court of Criminal Appeals for Oklahoma which entered an Order Affirming Denial of Post-Conviction Relief, relying on *Dean* v. *Crisp*, 536 P.2d 961 (Okl.Cr. 1975). *See* [*M*] v. *State* (Unpublished) No. PC-75-352 (Okl.Cr. July 3, 1975) (Reproduced at Appendix H). *Dean* v. *Crisp*, supra, had been decided only two (2) days prior to the date the District Court denied relief.

On September 10, 1975, Paul M., by his attorney, filed a petition requesting, among other things, habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Oklahoma, alleging an unconstitutional conviction pursuant to *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972), and *Radcliff* v. *Anderson*, 509 F.2d 1093 (10th Cir. 1975). Paul M. also alleged exhaustion of the issue at the state level. The case was held in abeyance pursuant to the federal District Court's June 18, 1976 order, until certain appeals by the Court of Appeals for the Tenth Circuit were resolved.

On March 13, 1978, the federal District Court issued a memorandum opinion in the case below, the Honorable Joseph W. Morris presiding. Pursuant to footnote six of *Bromley* v. *Crisp*, 561 F.2d 1351, 1356 (10th Cir. 1977), the State was granted 120 days to secure a state court's determination as to whether Paul M. would have been certified an an adult for state criminal prosecution. [*M*] v. *Crisp*, No. 75-249-C (E.D. Okl. March 13, 1978) (Reproduced at Appendix I).

On May 23, 1978, the District Court of Oklahoma County, State of Oklahoma, entered its Order, upon application filed by the State of Oklahoma requesting a certification hearing, that the court lacked subject matter jurisdiction and that the State of Oklahoma could not unilaterally invoke the jurisdiction of the District Court to review the conviction. The court, therefore, denied the application to set hearing. *State* v. [*M*], No. CRF-70-3097 (Okl.Co.D.C. May 23, 1978) (Reproduced at Appendix J). Paul M. did not attempt to seek a State hearing during this 120-day stay, nor has Mr. M. subsequently sought relief from the State courts.

On June 27, 1978, the State informed the federal District Court of the finding by the state District Court that it no longer had jurisdiction of the matter and the state court's finding that the State had no authority to invoke the jurisdiction of the State District Court regarding this conviction. In view of the procedure announced by the Court of Appeals in *Bromley* v. *Crisp*, supra, the State at the same time requested a hearing before the federal District Court on the certification hearing.

The case was reassigned from the Honorable Joseph Morris, United States District Judge, to the Honorable H. Dale Cook, United States District Judge. On November 30, 1978, Judge Cook gave the State twenty (20) days to show cause why the writ should not issue since a state court determination had not been obtained within the period provided by Judge Morris. (Reproduced at Appendix K.) In response the State re-urged the fact that it was unsuccessful in invoking the state trial court's jurisdiction and again as an alternative to the issuance of the writ requested an

opportunity to prove the certificability of M. before the federal court. (See Appendix K.)

On February 14, 1979, the Court of Criminal Appeals of Oklahoma held that 10 O.S. 1971, § 1101(a), was unconstitutionally discriminatory and denied males between 16 and 18 years of age equal protection. *Edwards* v. *State*, 591 P.2d 313 (Okl.Cr. 1979). The State court then established a procedure, for the first time, to determine through post-conviction application whether retrospective relief should be granted to any individual male who was convicted of a criminal offense following transfer from a juvenile court while he was between 16 and 18 years of age without benefit of a certification hearing. At the same time the court partially overruled *Dean* v. *Crisp*, supra, the case the Oklahoma courts had relied upon in rejecting Paul M's application for post-conviction relief. (See Appendix H, Order Affirming Denial of Post-Conviction Relief, [*M*] v. *State*, No. PC-75-352 [Okl.Cr. 1975].)

On June 25, 1979, the United States District Court for the Eastern District, Honorable H. Dale Cook, issued its Order setting a hearing on the issue of certification, together with a hearing regarding an alleged bad faith effort by respondents to comply with the court's Order of March 13, 1978. Paul M. had alleged in substance that counsel for the State had not tried hard enough to get a state certification proceeding heard in the District Court of Oklahoma County. Order (unpublished), [*M*] v. *Crisp*, No. 75-249-C (E.D. Okl. June 25, 1979). (Reproduced at Appendix L.) The date originally set for the evidentiary hearing was August 2, 1979. Instead, the court conducted a pre-trial hearing on August 2, 1979. Discovery was then

sought by Mr. M. and two depositions were taken and filed. In the course of Mr. M.'s discovery efforts, the State on January 24, 1980, sought a protective order wherein it was specifically pointed out to the District Court that the Court of Criminal Appeals of Oklahoma had established through *Edwards* v. *State*, supra, a new procedure whereby Paul M. could and should seek review of the contentions then in front of the federal court. (See Appendix M.) This position was consistent with a letter-report made by the State on August 28, 1979, filed of record September 18, 1979, in which the federal District Court was shown that state convicts with the same claim as Paul M. were filing claims through the State's Post-Conviction Procedure Act, 22 O.S. 1971, § 1080, *et seq.*, and these claims being entertained by the District Court for Oklahoma County. (Reproduced at Appendix M.) The federal court was further informed in this report that Mr. M. had not filed a post-conviction application and was reminded that the State had no means of invoking the State District Court's jurisdiction. The report went on to state:

> "I am forwarding a copy of this letter to Mr. Gilbert and would reiterate our position in that the Oklahoma Criminal Appeals [*sic*] decision in Edwards v. State, Okl.Cr., 591 P.2d 313 (1979) affords petitioner an opportunity to present to the State District Court some valid reason to believe that certification would have been denied. This remedy was not available at the time this cause commenced. However, it is Respondent's position that Petitioner [M] cannot avail himself of the machinery of this Court until he has exhausted *all* state remedies." (Emphasis in original)

The federal evidentiary hearing was subsequently reset for August 6, 1980, reset for November 3, 1980, and finally

reset and heard in Tulsa, Oklahoma, on November 13, 1980. On page six of the transcript from that proceeding, the court stated:

> "THE COURT: And it seemed to me that we were at a point in this case if we held a certification hearing — and I will say this, I have toyed with the idea of sending it back to state court because clearly now the state has recognized its responsibility and the Court of Criminal Appeals has changed its position. . . . But just to be totally honest with you, and I would be no otherwise, I am concerned whether an objective fair hearing could be held at the district court level in Oklahoma County, occasioned by the conflicts that have existed during this period of ti.. .. And frankly I didn't want to throw Mr. Gilbert back into that situation. I envision the first thing he is going to do is to try to disqualify the judge and try to get it assigned to somebody in there, and I think he has got a right to do that. I am not criticizing him at all, I am just simply saying I would be putting you all and him and his client in an atmosphere of uncertainty, and it just seemed better, orderly judicial business to simply say, okay, we will hold it here. I will do the best I can on it and we will see if we can avoid the legal scramble that has been going on. That is really where we are."

The certification hearing proceeded with the expressed acquiescence of the attorney for the State. The State put on police investigator Richard Mullins, who had been responsible for the inquiry into the homicide of Willie Droke. The testimony showed that Paul M. had been arrested in connection with the homicide and that, in the presence of Mr. M.'s mother, Paul M. was interrogated after being advised of his constitutional rights as a suspect (Tr. 15).

This police interrogation commenced at 10:35 a.m. on November 5, 1970 (Tr. 24). Mr. M. had been returned to the Oklahoma City jail from Los Angeles county jail the previous evening, arriving about midnight (*Id.*). The State then attempted to introduce a copy of an interrogational rights form signed by Mr. M., his mother, another policeman, and Officer Mullins. Mr. M.'s attorney voir dired Officer Mullins regarding the ability of the Officer to determine the literacy of an individual. Upon questioning, it was established that the Officer had read the rights from the paper to Mr. M. and his mother; and upon his asking them if they understood, they told the Officer, "yes" (Tr. 22). This signed interrogational rights form was admitted into evidence (Tr. 33). Further direct examination of the Officer revealed that in his opinion Paul M. appeared to be under no coercive threat that would affect the voluntary nature of statements made (*Id.*).

The State then attempted to offer statements made by Paul M. to Officer Mullins into evidence. The hearing was transformed into a suppression hearing of Mr. M.'s confession. Officer Mullins testified that he and another officer had a verbal conversation in the presence of Mr. M.'s mother prior to reducing Paul M.'s statements to writing (Tr. 38-39). Then in front of a typist the statements were printed on paper. Mr. M. never indicated to the Officer that he had trouble reading or understanding the documents (Tr. 40).

Paul M.'s attorney then called M.'s mother, May, who testified that she and Paul M. were illiterate and not able to understand his rights. On cross-examination by the State, she testified that Mr. M. had been before a juvenile

judge prior to being arrested in the Droke murder (Tr. 58). She testified that she was not threatened by Officer Mullins to sign the rights statement (Tr. 60), and that they read her a statement of rights but she could not understand what they were saying (Tr. 60). She testified that the officers were neither rude nor threatening to Mr. M. (Tr. 61). She confirmed that Paul M. was questioned in her presence (*Id.*). Finally, when asked about her understanding of the right to remain silent, she said "means to keep your mouth shut I guess" (Tr. 62).

Paul M. was then put on the stand by his counsel. He was, at the time of his arrest, a seventh grade dropout who could only read "just a little" (Tr. 64). He stated that he did not know what a lawyer was at age seventeen. He testified that Officer Mullins told him he would be in "big trouble" if he did not sign the statement, so he signed it out of fear (Tr. 68-69). He also testified that no one read the rights statement to him. When asked why he signed the confession, he said, "I didn't think it was all that important" and "they told me that if I didn't I would be in big trouble, so I signed the paper, not understanding what it was" (Tr. 68).

On cross-examination, Paul M. testified that he was familiar with his mother's handwriting and the writing on the rights statement appeared to be her signature (Tr. 74). He also testified that he knew he was being interrogated in connection with a murder which he realized was a serious matter (Tr. 74-A). Paul M. confirmed he was only questioned by the police in his mother's presence (Tr. 75).

Mr. M.'s older brother then took the stand. He testified that May M. could not read or write (Tr. 80), that he

never knew Mr. M. could read or write because when mail was received he or someone else would have to read it, and Paul M.'s father also could not read or write (Tr. 80). He also testified that Paul M. had no experience with attorneys prior to the time of the interrogation (Tr. 82).

The court below suppressed the confession of Paul M. from the certification hearing. (See Oral Ruling of court, Appendix B.)

The State then called Officer Mullins back to the stand in order to lay a foundation for introduction of a "case card" from the case card file of the Oklahoma City Police Department, Juvenile Division. The case card was admitted (Tr. 101), demonstrating prior involvement with the juvenile court. It was noted before the card was admitted that Paul M.'s juvenile court records had been destroyed in the past and that the card represented the only proof of his juvenile record (Tr. 94-95).

Mr. M. then moved for judgment; and the court found that, from the evidence presented, the defendant would not have been certified as an adult (Tr. 106). The court stated that it had no choice but to issue the Writ of Habeas Corpus (Tr. 106); but stayed taking any action at that time in order to permit the State to decide what action to take in response to that decision.

On November 20, 1980, the State moved to reopen the cause for further evidentiary hearing because of the discovery of records from the Department of Mental Health of Oklahoma pertaining to Paul M.'s committment to Central State Hospital for a period of observation following his arrest in 1970. These records were available for inspection

prior to the evidentiary hearing of November 13, 1980, but counsel for the State noted that the Department of Mental Health was not consulted nor its records inspected prior to that evidentiary hearing because of the serious nature of the offense, the age of Paul M., statements made by him after his arrest, and the belief that this would be more than enough to find that a state court would have certified Paul M. to be tried as an adult had a certification hearing been held.

A hearing on the State's motion to reopen for further evidentiary hearings was held on March 11, 1981, before the Honorable H. Dale Cook, United States District Judge. The court overruled the State's motion to reopen.

On March 12, 1981, respondents filed a motion to stay execution of the Writ of Habeas Corpus, pursuant to Rule 23(c), F.R. App.P., 28 U.S.C.A. A hearing on this motion was held on March 25, 1981, before the Honorable H. Dale Cook, District Judge. The court overruled the motion to stay and contrary to the factual finding by the Court of Appeals below, *Crisp* v. [*M*], supra, 668 P.2d at 1131, the Writ of Habeas Corpus and Order of Release were executed on March 25, 1981. As of April 20, 1981, Paul M. was said to be in Houston, Texas, no longer under the custody of the State pursuant to the Oklahoma Judgment and Sentence on Plea of Guilty for the Murder of Willie Droke.

The Court of Appeals affirmed the District Court. The Court of Appeals found that under the circumstances of this case re-exhaustion of Paul M.'s state remedies was not required. The court also concurred with the District Court

that the oral and written statements of Paul M. could not be used to decide whether Paul M. would have been certified to stand trial as an adult. The State prays to this Court for relief from these judgments.

REASONS FOR GRANTING THE WRIT

I.

THE FAILURE OF THE INFERIOR FEDERAL COURTS TO REQUIRE PAUL M. TO EXHAUST AN AVAILABLE ADEQUATE STATE REMEDY THAT BECAME AVAILABLE AFTER THE INSTITUTION OF FEDERAL HABEAS CORPUS PROCEEDINGS IS A CONFLICT IN RESULT WITH THE DECISIONS OF OTHER CIRCUITS REGARDING THE EXHAUSTION REQUIREMENT AND IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Paul M. brought this action in federal court for habeas corpus relief on September 10, 1975, having earlier the same year sought and been denied relief in the state courts on the basis of *Dean* v. *Crisp*, supra. Action on the merits of Paul M.'s petition was delayed for various reasons for about five (5) years. On February 14, 1979, in the case of *Edwards* v. *State*, supra, the Court of Criminal Appeals of Oklahoma partially overruled *Dean* v. *Crisp*, supra, and as a consequence Paul M. had an actionable claim under the State of Oklahoma's Post-Conviction Procedure Act, 22 O.S. 1971, § 1080, *et seq*. Paul M. never requested the federal court to abate its proceedings while he pursued this remedy, nor did he petition the appropriate state district court for relief on the basis of *Edwards* v. *State*, supra.

The State directly informed the District Court of the availability of the state remedy and Paul M.'s failure to pursue that remedy on September 18, 1979, and of the State's position that Paul M. must exhaust this remedy before the federal court took any action. This position was re-urged by the State on January 24, 1980. (See Appendix M.) The federal District Court did not order Paul M. to exhaust this new remedy. The federal District Court proceeded to set the matter for hearing that eventually was held on November 13, 1980, some twenty-two (22) months after the state remedy became available.

The Court of Appeals affirmed the District Court's decision not to require re-exhaustion, relying on *Roberts* v. *LaVallee*, 389 U.S. 40 (1967). The court acknowledged its own precedent of *Drennon* v. *Hess*, 642 F.2d 1204 (10th Cir. 1981), on the issue of re-exhaustion but distinguished it on the basis that it dealt with supervening changes in federal substantive law. 668 F.2d at 1138. It acknowledged cases such as *Case* v. *Nebraska*, 381 U.S. 336 (1965), and *James* v. *Copinger*, 428 F.2d 235 (4th Cir. 1970), but held these cases only require a federal court to require re-exhaustion when a supervening change in state procedural law occurs. *Id.* The Court of Appeals distinguished the case at bar with those where re-exhaustion was required, stating:

> "... First Oklahoma refused to recognize the constitutional violation for many years. Meanwhile the Attorney General, in effect, conceded that no action was to be expected from the Oklahoma courts and approved a hearing by the federal court. Further exhaustion was likely to prove futile. The Attorney General recognized this fact, as shown by his sug-

gesting that the federal court hear the issue." 668 F.2d at 1139.

The Court of Appeals misapplied *Roberts* v. *LaVallee*, supra. In *Roberts* the indigent petitioner had exhausted his state remedies in seeking a free transcript. Between the time the federal court took action and the time of the decision on the merits of the appeal, the state supreme court found that indigent state prisoners were entitled to a free transcript. The Court of Appeals reversed for re-exhaustion and this Court reversed the Court of Appeals, stating:

> ". . . Petitioner has already thoroughly exhausted his state remedies, as the Court of Appeals recognized. Still more state litigation would be both unnecessarily time-consuming and otherwise burdensome. This is not a case in which there is *any substantial state interest* in ruling once again on petitioner's case. We can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is *predetermined by established federal principles.*" (Emphasis added) 389 U.S. at 43.

There was a substantial state interest in the case at bar since decision of the ultimate issue required an application of state law to the facts of the case and ultimate relief was not "predetermined." *Edwards* v. *State*, supra, established as a procedural prerequisite for the statement of a substantial claim of unconstitutional sexual discrimination for which relief should be granted that a petitioner state to the state district court some valid reason to believe that the transfer to the adult trial division would have been denied. 591 P.2d at 321. Once a petitioner articulates such

a reason, the State then assumes the burden of proving that transfer to the adult trial division probably would have occurred. *Id.* "All" evidence bearing on that issue may be considered by the court concerning the nature of the offenses committed. *Id.*, at 322. By contrast the Court of Appeals' procedure does not require the petitioner to show some valid reason to believe jurisdiction would not have been transferred to the adult trial division and hearings are conducted as a *post hoc* transfer case. Inasmuch as Paul M. had admittedly participated in a brutal murder only one (1) month before he reached the age of eighteen (18), it is probable that Paul M. could not articulate such a reason within the Oklahoma procedure announced in *Edwards* and thereby cause the State to be put to its proof. Failure to articulate such a reason could have applied as failure to satisfy a valid state procedural rule. *Cf., Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murch* v. *Mottram*, supra. Consequently, there was a substantial state interest in the relitigation of the claim in the state courts.

The record shows that Paul M. turned eighteen (18) years old five (5) days after he was returned from California to Oklahoma to answer to the murder charge. Consistent with Paul M.'s sex discrimination theory, the Oklahoma juvenile justice system became legally barred from exercising *any* supervisory control over Paul M. once he became eighteen years old. Compare, 10 O.S. Supp. 1970, § 1101(a), to 10 O.S. Supp. 1968, §§ 1102, 1116, 1138 and 1139 (showing as valid a claim against supervision by juvenile justice authorities after a male person reached eighteen (18) years of age as Paul M. had against the manner in which the adult trial division acquired jurisdiction over

him to entertain his plea to the "adult" charge and sentence him in accordance with that plea). The legal impotence of the juvenile system to provide *any* supervision to Paul M. in response to his participation in the murder of Willie Drokе lends further support to the State's position that Paul M. could not articulate a substantial claim under the *Edwards* v. *State*, supra, procedure of sexual discrimination regarding the manner in which the adult trial division acquired jurisdiction over his case.

This Court this term has re-examined the principles upon which the requirement of exhaustion was premised. *Rose* v. *Lundy*, ___ U.S. ___, No. 80-846 (March 3, 1982). The reasons given by the Court of Appeals for affirming the denial of re-exhaustion, encapsulated in the quote above, are inconsistent with the principles upon which the exhaustion requirement was based. Although this Court has not passed upon the issue, and the Court of Appeals below was careful to preserve its silence upon the subject, 668 F.2d at 1138, many federal courts have held that the exhaustion requirement is so important it cannot be waived. *United States ex rel. Trantino* v. *Hatrock*, 563 F.2d 86 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978); *United States ex rel. Sostre* v. *Festa*, 513 F.2d 1313 (2d Cir. 1974), *cert. denied*, 423 U.S. 841 (1975); *Needel* v. *Scafati*, 412 F.2d 761 (1st Cir. 1969), *cert. denied*, 396 U.S. 861. See *Sweet* v. *Cupp*, 640 F.2d 233 (9th Cir. 1981). See generally *Davis* v. *Campbell*, 608 F.2d 317 (8th Cir. 1979); *United States ex rel. Lockett* v. *Illinois Pardon and Parole Board*, 600 F.2d 116 (7th Cir. 1979); *Blackwell* v. *Wolff*, 454 F.2d 48 (8th Cir. 1972). But see *Houston* v. *Estelle*, 569 F.2d 372 (5th Cir. 1978); *Jenkins* v. *Fitzberger*, 440 F.2d 1188 (4th Cir. 1971).

Thus, there appears to be an effective conflict between the decision of the Court of Appeals in the case below and the decision of Courts of Appeals of other Circuits on the question of whether the exhaustion requirement can be waived or an estoppel applied.

It is difficult to fathom why the District Court apparently ignored the fact that Paul M. had an available state remedy for more than a year after the state carefully informed the court of the availability of the remedy and the State's position that Paul M. should exhaust the remedy. The State had no means of invoking the state court's jurisdiction in the interim, a matter apparently conceded by the Court of Appeals below. *Crisp* v. [*M*], supra, at 1133 and n. 2.

The Court of Appeals' statement that further exhaustion by Paul M. was likely to prove futile is likewise puzzling. The state court had promptly originally entertained the issue on its merits despite the availability of an adequate state procedural bar to the claim. Compare 22 O.S. 1971, § 1086, and *Murch* v. *Mottram*, supra. The Court of Criminal Appeals had overruled the case that stood as a bar to Paul M.'s case, thus clearing the way to a litigation of a meritorious claim in the state court. The fact that nearly two (2) years passed between the time the Oklahoma courts recognized Paul M.'s claim and the time the federal court eventually granted him release appears to have been overlooked by the Court of Appeals in its haste to chastize the Oklahoma courts. Under the circumstances of this case, re-exhaustion in the state courts would not have caused an unnecessary delay in considering the merits of his case and should have been required.

The departure of the federal District Court below from the usual course of judicial proceedings in reference to the exhaustion requirement, which was sanctioned by the decision of the Court of Appeals, calls for an exercise of this Court's power of supervision and the writ should be granted to examine whether re-exhaustion should be required.

II.

THE INFERIOR FEDERAL COURTS' FINDING THAT THE STATEMENTS OF PAUL M. SHOULD BE BARRED FROM EVIDENCE ON THE BASIS THAT PAUL M. HAD NOT BEEN GIVEN MEANINGFUL WARNING OF HIS RIGHT TO REMAIN SILENT ARE CONTRARY TO LAW AND UNSUPPORTED BY THE RECORD AND THEREFORE APPROPRIATE FOR REVIEW BY THIS COURT AS AN EXERCISE OF ITS SUPERVISORY POWERS OVER INFERIOR FEDERAL COURTS.

Paul M. and his mother, May M., were read the warnings prescribed by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). See Appendix B and Appendix E. The circumstances of the waiver are summaried at pp. ____ of this petition. The District Court apparently held on the basis of certain incredible testimony that the warnings had no real meaning to either Paul M. or May M. and excluded the subsequent statement from evidence. The Court of Appeals affirmed this finding. The lower courts' decisions are in conflict with the purpose of the exclusionary rule and the reasoning for prescribing the *Miranda* warnings. This Court should review this matter as an exercise of this Court's supervisory jurisdiction.

III.

A STATEMENT VOLUNTARILY MADE TO THE POLICE SHOULD BE ADMISSIBLE AT HEARING CONCERNING WHETHER JURISDICTION OF THE JUVENILE DIVISION OF THE STATE DISTRICT COURT SHOULD BE TRANSFERRED TO THE ADULT TRIAL DIVISION.

The Court of Appeals relied upon *In re Gault*, 387 U.S. 1 (1967), and *J.T.P.* v. *State*, 544 P.2d 1270 (Okl.Cr. 1975), to affirm the federal District Court's exclusion of Paul M.'s voluntary statements from the State's case. The decision in *J.T.P.* v. *State*, supra, clearly turned upon the federal question and also relied upon *Gault*, supra.

The Court of Appeals and Court of Criminal Appeals have misapplied *Gault* to transfer proceedings since the matter before this Court in *Gault* was the adjudicatory hearing concerning the juvenile's delinquency rather than the appropriateness of entertaining a voluntary confession in a transfer proceeding in which *guilt* cannot be adjudicated, *Breed* v. *Jones*, 421 U.S. 519 (1975), but in which the sole issue is whether the accused shall come within the power of the juvenile division of the state trial court or stand trial as an adult.

This Court has not addressed the issue of whether a voluntary confession is inadmissible in a juvenile transfer proceeding. In *Kent* v. *United States*, 383 U.S. 541 (1966), this Court found that transfer proceedings were of such "critical importance" that an arbitrary decision to transfer would violate due process. This Court stated in *Kent* that there was no need for a transfer hearing to "conform with all the requirements of a criminal trial or even the usual administrative hearing," but only that the hearing must

"measure up" to the essentials of due process and fair treatment. *Id.*, at 562. In *Breed* v. *Jones*, supra, this Court stated:

> ". . . [T]*he Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court.* We require only that, whatever the evidence demanded, a State determine whether it wants to treat a juvenile within the juvenile court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings." (Footnote omitted, Emphasis added) 421 U.S. at 537-38.

This Court in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), explained the purposes for the exclusionary rule: to deter unlawful police conduct and protect the courts from reliance on untrustworthy evidence. This Court, quoting in *Michigan* v. *Tucker*, from *United States* v. *Calandra*, 414 U.S. 338 (1974), affirmed that "[t]he rule is calculated to prevent, not repair." 417 U.S. at 446. In *Tucker* this Court noted that where there has been genuine compulsion of testimony the exclusionary rule has been given broad scope. *Id.*, at 440. Where the right against compulsory incrimination has been extended beyond the scope of the proceedings at which culpability is determined, the underlying concern is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage. *Id.*, at 440-41. This Court noted that prior to *Miranda* v. *Arizona*, supra, the principal issue was not whether a defendant had *waived* his privilege against self-

incrimination, but "simply" whether his statement was voluntary. *Id.*, at 441. This Court concluded in *Tucker* that even though the defendant had made a statement to the police without adequate warnings being given regarding his right to remain silent, information obtained from that statement could be used to obtain other evidence that could be used against him at trial.

Other courts have permitted the use of voluntary, but uncounselled, statements in proceedings where the issue of guilt vs. innocence is not involved. Such a statement may be used by a state in obtaining extradition of a person from another jurisdiction. *United States* v. *Flood*, 374 F.2d 554 (2d Cir. 1967). The exclusionary rule is held inapplicable to proceedings for revocation of parole. *United States* v. *MacKenzie*, 601 F.2d 221 (5th Cir. 1979); *United States* v. *Frederickson*, 581 F.2d 711 (8th Cir. 1978) (and cases cited therein, *Id.*, at 713); *Commonwealth* v. *Kates*, 452 Pa. 102, 305 A.2d 701 (1973). See also *Wilson* v. *State*, 621 P.2d 1173 (Okl.Cr. 1980) (holding that a person has no Fifth Amendment privilege against self-incrimination in a proceeding for revocation of parole or probation).

In *United States* v. *Calandra*, supra, the question was whether a person could refuse to answer questions posed by a Grand Jury on the ground that the questions were the fruit of information obtained by way of an unlawful search and seizure. This Court noted that a Grand Jury is not an adversary hearing at which guilt or innocence of the accused is adjudicated. 414 U.S. at 343. The Court also observed that society has an "important interest" in a thorough and extensive investigation. *Id.*, at 344. In noting the primary purpose of the exclusionary rule to be to deter

future police misconduct, rather than serve as a redress to the injury of the defendant, the Court concluded that misconduct would in no substantial way be less deterred by the fact that the Grand Jury may use the evidence to question the defendant since the evidence cannot be used at the trial to prove the State's case. *Id.*, at 351-52. Compare Policy Memorandum of United States District Court for the District of Columbia, appended to the *Kent* decision, where the prosecutive merit consideration in a juvenile transfer proceeding was determined by "whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney)." 383 U.S. at 567.

This Court has yet to pass on this important question of federal constitutional law. The public at large has an important interest in the thorough and extensive investigation addressed to the question of whether a person should be held accountable for crimes as an adult or be supervised through the juvenile rehabilitation process. A voluntary statement of the accused may provide useful facts to the court in making that important decision.

IV.

A STATEMENT VOLUNTARILY MADE TO THE POLICE SHOULD BE ADMISSIBLE AT A HEARING HELD SOME TEN (10) YEARS AFTER PAUL M. PLED GUILTY TO THE CRIME OF MURDER WHEN THE SOLE ISSUE BEFORE THE COURT IS WHETHER JURISDICTION OF THE JUVENILE DIVISION WOULD HAVE BEEN TRANSFERRED TO THE ADULT TRIAL DIVISION.

The issue of guilt (delinquency) was not before the District Court in this *post hoc* transfer proceeding. A decision on the merits would not incriminate Mr. M.; he incriminated himself long ago when he voluntarily and knowingly entered his counselled plea of guilty to the charge of murder. *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

The "primary purpose" of the exclusionary rule is to deter illegal police conduct, *Michigan* v. *Tucker*, supra. Police conduct would not significantly be affected by permitting such evidence at a transfer proceeding. The police made a good faith attempt to explain to Mr. M. his constitutional rights — the only finding in this case is that *subjectively* he and his mother were incapable of understanding the advice as read by the officer. See, *Id.*, 417 U.S. at 447 (where this Court stated that where officials proceeded in complete good faith the deterrence rationale loses much of its force). The deterrence of such official conduct will not significantly be lessened if this Court permits voluntary statements to be admitted in *post hoc* transfer proceedings since ordinarily such evidence could have been attacked before a decision was reached on the guilt (delinquency) issue, *Id.*, and because it was available evi-

dence that had withstood the passage of time, the destruction of records and the fading of memories. Furthermore, it appears that it would have been admissible in an Oklahoma proceeding. *Edwards* v. *State*, supra, 591 P.2d at 322.

Balanced with the foregoing considerations is the "strong interest" in making available to the fact finder "all" relevant and trustworthy evidence which either party seeks to introduce. *Michigan* v. *Tucker*, supra, 417 U.S. at 450. Also see *Edwards* v. *State*, supra, 591 P.2d at 322 ("all" evidence may be considered by the court on the *post hoc* transfer decision). The testimony Officer Mullins was prepared to relate would have been subject to the safeguards of cross-examination and probable rebuttal testimony by Paul M. The statements given by Paul M. were certainly relevant to determining whether, in fact, an Oklahoma juvenile trial division judge would have concluded that a person who had numerous prior contacts with the law; who admitted participation in a cruel, heinous murder; who was only one month away from his eighteenth (18th) birthday when he participated in that crime; and who was legally emancipated from the control of juvenile authorities after his eighteenth (18th) birthday should be retained under the supervision of the juvenile division or whether jurisdiction should be transferred to the adult trial division. The State submits that there is *no reasonable doubt* that presented such evidence an Oklahoma District Court would have transferred jurisdiction over Paul M. to the adult trial division.

The statutory infirmity Paul M. relied upon to obtain his release existed from 1941 through April 4, 1972, when the Legislature replaced the statute with a new provision.

Dean v. *Crisp*, supra, 536 P.2d at 965. Similar cases will be litigated on the basis of available surviving evidence. A voluntary statement made shortly after the crime occurred may be among the only evidence the court will have to weigh applicable criteria for the transfer decisions. *Edwards* v. *State*, supra, 591 P.2d at 320 and n.14.

The instant issue is one of substantial importance that has never been decided by this Court. The writ should issue to decide this question.

Respectfully submitted,

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No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY FIELDS, Acting Warden, Joseph Harp Correctional Center, and THE STATE OF OKLAHOMA,
Petitioners,

vs.

PAUL M.*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPENDICES

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1, provides:

Section 1. All persons born or naturalized in the United States, and subject to the judisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. § 1254 provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant

to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at the time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Title 28 U.S.C. § 2254 provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a

determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceedings;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceedings;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceedings; or

(7) that the applicant was otherwise denied due process of law in the State Court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such

factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Title 10 O.S. Supp. 1970, § 1101, provided in relevant part as follows:

Definitions.—When used in this act, unless the context otherwise requires:

(a) The term "delinquent child" means (1) any male person under the age of sixteen (16) years and any female person under the age of eighteen (18) years, who has violated any federal or state law or municipal ordinance, excepting a traffic statute or ordinance, or any lawful order of the court made under this act; or (2) a child who has habitually violated traffic laws or ordinances.

* * * *

(d) The term "Department" means the Department of Public Welfare of the State of Oklahoma.

(e) The term "adjudicatory hearing" means a hearing to determine whether the allegations of a petition under Section 1103 of this Title are supported by the evidence and whether a child should be adjudged to be a ward of the court.

(f) The term "dispositional hearing" means a hearing to determine what order of disposition should be made with respect to a child adjudged to be a ward of the court.

Title 10 O.S. Supp. 1968, § 1102, provided:

Jurisdiction of District Court—Transfer of proceedings.—The District Court shall have jurisdiction of any delinquent child, child in need of supervision, or dependent and neglected child, who is found within the county; and of the parent, guardian or legal custodian of the child, regardless of where the parent, guardian or legal custodian is found. When jurisdiction shall have been obtained over any child, it may be retained until the child becomes twenty-one (21) years of age if a male, and may be retained until the child becomes eighteen (18) years of age if a female. For the convenience of the parties and in the interest of justice, a proceeding under this Act may be transferred to the District Court in any other county.

Title 10 O.S. Supp. 1970, § 1109, provided:

Questioning of children—Counsel—Prosecution by District Attorney.—(a) No information gained by questioning a child shall be admissible into evidence against the child unless the questioning about any alleged offense by any law enforcement officer or investigative agency, or employee of the court, or the Department is done in the presence of said child's parents, guardian, attorney, or the legal custodian of the child, and not until the child and his parents, or guardian, or other legal custodian shall be fully advised of their constitutional and legal rights, in cluding the right to a jury trial as herein provided, and the right to be represented by counsel at every stage of the proceedings, and the right to have counsel appointed by the court and paid out of the court fund if the parties are without sufficient financial means; provided, however, that no legal aid or other public or charitable legal service shall make claim for compensation as contemplated herein.

(b) If the child or his parents, guardian, or other legal custodian requests an attorney and is found to be without sufficient financial means, counsel shall be appointed by the court if the child is being proceeded against as a delinquent child, or a child in need of supervision, or if termination of parental rights is a possible remedy, provided that the court may appoint counsel without such request, if it deems representation by counsel necessary to protect the interest of the child or of other parties.

(c) Upon the request of the court, the District Attorney shall prepare and prosecute any case or proceeding within the purview of this act.

Title 10 O.S. Supp. 1968, § 1112, provided:

Children charged with violating state statute or municipal ordinance—Juvenile proceedings.—(a) Except as hereinafter provided, a child who is charged with having violated any State statute or municipal ordinance shall not be tried in a criminal action, but in a juvenile proceeding

in accordance with this Act. If, during the pendency of a criminal or quasi-criminal charge against any person, it shall be ascertained that the person was a child at the time of committing the alleged offense, the court shall transfer the case, together with all the papers, documents and testimony connected therewith, to the juvenile division of the court. The division making such transfer shall order the child to be taken forthwith to the place of detention designated by the juvenile division, to that division itself, or release such child to the custody of some suitable person to be brought before the juvenile division. However, nothing in this Act shall be construed to prevent the exercise of concurrent jurisdiction by another division of the District Court or by police courts or municipal courts in cases involving children wherein the child is charged with the violation of a State or municipal traffic law or ordinance.

(b) If a child is charged with delinquency as a result of an offense which would be a crime if committed by an adult, the court, after full investigation and a preliminary hearing, may in its discretion continue the juvenile proceeding, or it may certify such child capable of knowing right from wrong, and to be held accountable for his acts, for proper criminal proceedings to any other division of the court which would have trial jurisdiction of such offenses if committed by an adult.

(c) Prior to the entry of an order of adjudication, any child in custody shall have the same right to be released upon bail as would an adult under the same circumstances.

Title 10 O.S. Supp. 1968, § 1113, provided:

Allegations of petition not supported by evidence.— If the court finds that the allegations of the petition are not supported by the evidence, the court shall order the petition dismissed and the child discharged from any detention or restriction previously ordered. The child's parents, guardian or other legal custodian shall also be discharged from any restriction or other previous temporary order.

[APPENDIX]

Title 10 O.S. Supp.1968, § 1114, provided:

Allegations of petition supported by evidence.— If the court finds that the allegations of the petition are supported by the evidence, and that it is in the best interest of the child and the public that he be made a ward of the court, the court shall sustain the petition, and shall make an order of adjudication, setting forth whether the child is delinquent, or in need of supervision, or neglected or dependent, and shall adjudge the child as a ward of the court.

Title 10 O.S. Supp. 1968, § 1115, provided:

Dispositional hearings—Additional reports or evidence. —(a) After making an order of adjudication, the court shall hold a dispositional hearing, at which all evidence helpful in determining the proper disposition best serving the interest of the child and the public, including oral and written reports, may be admitted and may be relied upon to the extent of its probative value, even though not competent for the purposes of the adjudicatory hearing.

(b) Before making an order of disposition, the court shall advise the District Attorney, the parents, guardian, custodian or responsible relative, or their counsel of the factual contents and the conclusion of reports prepared for the use of the court and considered by it, and afford fair opportunity, if requested, to controvert them.

(c) On its own motion or that of the District Attorney, or of the parent, guardian, custodian, responsible relative or counsel, the court may adjourn the hearing for a reasonable period to receive reports or other evidence and, in such event, shall make an appropriate order for detention of the child, or his release from detention subject to supervision by the court, during the period of the continuance. In scheduling investigations and hearings, the court shall give priority to proceedings in which a child is in detention, or has otherwise been removed from his home, before an order of disposition has been made.

Title 10 O.S. Supp. 1968, § 1116, provided:

Disposition orders permissible. — (a) The following kinds of orders of disposition may be made in respect to wards of the court:

(1) The court may place the child on probation or under supervision in his own home, or in the custody of a suitable person elsewhere, upon such conditions as the court shall determine. The court may require the parent or other person to give security by bond, with surety or sureties approved by the court, for compliance with such order.

If it is consistent with the welfare of the child, the child shall be placed with his parent or legal guardian, but if it appears to the court that the conduct of such parent or guardian has contributed to such delinquency, or need of supervision, or dependency or neglect, the court may issue a written order specifying conduct to be followed by such parent or guardian with respect to such child. The conduct specified shall be such as would reasonably prevent the child from becoming in need of supervision, or becoming dependent or neglected, as defined by this Act. Such order shall remain in effect for a period of not more than one (1) year to be specified by the court, and the order may be extended or renewed by the court.

(2) The court may commit the child to the custody of a private institution or agency, including any institution established and operated by the county, authorized to care for children or to place them in family homes. In committing a child to a private institution or agency, the court shall, whenever practicable, select one that is licensed by the Department (or other State Department supervising or licensing private institutions or agencies); or if such institution or agency is in another state, by the analogous department of that state. Whenever the court shall commit a child to any institution or agency, it shall transmit with the order of commitment a summary of its informa-

tion concerning the child, and such institution or agency shall give to the court such information concerning the child as the court may at any time require.

(3) The court may commit the child to the custody of the Department; provided, any order adjudicating a child to be delinquent and committing the child to the Department shall be for an indeterminate period of time.

(4) The court may dismiss the petition or otherwise terminate its jurisdiction at any time for good cause shown.

(b) The court may not terminate the rights of a parent who has not been notified that the parental rights may be terminated. If the court terminates the rights of a parent and commits the child to an individual or agency, the court may invest in such individual or agency authority to consent to the adoption of the child.

Title 10 O.S. Supp. 1968, § 1138, provided:

Adjudication as delinquent child—Authority of Department.—Whenever a child who has been adjudicated by the court as a delinquent child has been committed to the Department, the Department may:

(a) Place the child in an institution or other facility maintained by the State for delinquent children; or

(b) Place the child in an institution or other facility maintained by the State for dependent or neglected children, or in a foster home; or

(c) Allow the child his liberty, under supervision, either immediately or after a period in one of the facilities referred to in (a) or (b) above; or

(d) Place the child in a State school for mentally retarded, if the child is eligible for admission thereto.

Title 10 O.S. Supp. 1968, § 1139, provided:

Discharge of children adjudicated delinquent.—(a) All children adjudicated delinquent and committed to the Department shall be discharged at such time as the Department determines there is a reasonable probability that it is no longer necessary, either for the rehabilitation and treatment of the child, or for the protection of the public, that the Department retain legal custody.

(b) All children adjudged delinquent and committed to the Department and not discharged under subsection (a) shall be discharged when the child becomes eighteen (18) years of age, if a female, and twenty-one (21) years of age, if a male; provided, that the court which adjudicated the person delinquent may, upon petition of the Department, retain legal custody of the child.

(c) The Department shall not place a child under the age of ten (10) years in an institution maintained for delinquent children.

Title 22 O.S. Supp. 1970, § 1051, provided:

Right of appeal — Review — Corrective jurisdiction — Procedure — Scope of review on certiorari.— (a) An appeal to the Court of Criminal Appeals may be taken by the defendant, as a matter of right from any judgment against him, which shall be taken as herein provided; and, upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed; provided further, all appeals taken from any conviction on a plea of guilty shall be taken by petition for writ of certiorari to the Court of Criminal Appeals, as provided in paragraph (b) of this section, provided, such petition must be filed within ninety (90) days from the date of said conviction. The Court of Criminal Appeals may take jurisdiction of any case for the purpose of correcting the appeal records when the same do not disclose judgment

and sentence; such jurisdiction shall be for the sole purpose of correcting such defect or defects.

(b) The procedure for the filing of an appeal in the Court of Criminal Appeals shall be as provided in the Rules of the Court of Criminal Appeals; and the Court of Criminal Appeals shall provide by court rules, which will have the force of statute, and be in furtherance of this method of appeal: (1) The procedure to be followed by the trial courts in the preparation and authentication of transcripts and records in cases appealed under this act; (2) the procedure to be followed for the completion and submission of the appeal taken hereunder; and (3) the procedure to be followed for filing a petition for and the issuance of a writ of certiorari.

Title 22 O.S. Supp. 1969, § 1076, provided:

Notice to defendant of his right to appeal—Stay of execution of judgment.—The court shall at the time of entering judgment and sentence notify the defendant of his right to appeal. An appeal from a judgment of conviction stays the execution of the judgment in all cases where sentence of death is imposed, but does not stay the execution of the judgment in any other case unless the trial or appellate court shall so order.

Title 22 O.S. 1971, § 1080, provides:

Any person who has been convicted of, or sentenced for, a crime and who claims:

(a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;

(b) that the court was without jurisdiction to impose sentence;

(c) that the sentence exceeds the maximum authorized by law;

(d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;
may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

Title 22 O.S. 1971, § 1081, provides:

Commencement of proceeding.—A proceeding is commenced by filing a verified "application for post-conviction relief" with the clerk of the court imposing judgment if an appeal is not pending. When such a proceeding arises from the revocation of parole or conditional release, the proceeding shall be commenced by filing a verified "application for post-conviction relief" with the Clerk of the District Court in the county in which the parole or conditional release was revoked. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct. The Court of Criminal Appeals may prescribe the form of the application and verification. The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the district attorney.

[APPENDIX]

Title 22 O.S. 1971, § 1086, provides:

Subsequent application.—All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

PAUL [M]	:	
Plaintiff	:	
VS	:	NO. 75-249-C
	:	
RICHARD CRISP, ET AL	:	
Defendants	:	

ORAL RULINGS OF THE DISTRICT COURT AT NOVEMBER 13, 1980, HEARING, HON. H. DALE COOK, DISTRICT JUDGE, PRESIDING

THE COURT: Well, from the evidence that has been presented to the Court it seems apparent that Mrs. [M] and Mr. Paul [M] neither could read nor write. No question but that Officer Mullins read to them the document, I don't question his statement there. I have serious doubts though that it had any real meaning to either. It would appear to the Court that it was not a knowledgeable, knowing, understanding waiver, and under this testimony I am going to sustain the objection of counsel as to the confession. (Tr. 90, lns. 9-17)

THE COURT: I don't see any reason for the Court to take this matter under advisement. Mrs. Cox, I want to say to you that your honesty is very, very enlightening and very good. I have no question but that you presented everything you could. Under the state of the record the Court has no choice but to grant the writ, in that by saying that the evidence is insufficient to warrant a certification. The basis elements are simply not there in proof in the record, and, therefore, I find from the evidence presented that the defendant — that the petitioner would not have been certified as an adult. Anything further? (Tr. 106, lns. 15-25)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

PAUL [M], Plaintiff,	)	
v.	)	
	)	No. 75-249-C
RICHARD CRISP, Warden, Oklahoma State Penitentiary, Defendant.	)	

WRIT OF HABEAS CORPUS
and
ORDER OF RELEASE

THE UNITED STATES OF AMERICA, To:

Gary Maynard
Warden
Joe Harp Correctional Center
Lexington, Oklahoma

GREETINGS:

WHEREAS, this Court, on the 13th day of November, 1980, has vacated the judgment of conviction and sentence by which you are confining in your custody the person and body of one Paul [M], Petitioner herein,

AND WHEREAS FURTHER the Court finds that partial relief to effect the Petitioner's release from the imprisonment herein complained of may, and in justice should be granted concurrently with the consideration of other matters still pending herein,

THIS IS, THEREFORE, TO COMMAND YOU, Gary Maynard, Warden of the Joe Harp Correctional Center, Lexington, Oklahoma, all excuses and delays aside, to release and discharge the person and body of the Petitioner herein, Paul [M], from all imprisonment, custody and re-

straint deriving from the purported judgment of conviction and sentence in Oklahoma County District Court Case No. CRF-70-3097, and to set him to his full personal and physical freedom and liberty forthwith.

IT IS FURTHER ORDERED By the Court that any United States Marshal, or any other officer authorized by law to effect process, may serve, execute and return this Writ and Order; and further, that such service and execution shall be effected by the fastest means available, with any unusual expenses accruing by virtue of said fastest service and execution to be taxed as costs herein.

HEREOF FALL [*sic*] YE NOT, Under Penalty of Law and Pain of Contempt.

SO ORDERED, this 25 day of *March*, 1981.

(s) *H. Dale Cook*
UNITED STATES DISTRICT JUDGE

APPENDIX D

[Filed September 29, 1981]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RICHARD CRISP, Warden, et al, Appellants,	)	
v.	)	No. 81-1289
PAUL [M], Appellee.	)	

Appeal from the United States District Court
For the Eastern District of Oklahoma
(D. C. No. 75-249)

Larry Oakes, Assistant Attorney General, Oklahoma City, Oklahoma, (Jan Eric Cartwright, Attorney General, and Michael Avant-Pybas, Assistant Attorney General, Oklahoma City, Oklahoma, with him on the brief) for Appellants.

Fred P. Gilbert, Tulsa, Oklahoma, for Appellee.

Before McWILLIAMS and DOYLE, Circuit Judges, and TEMPLAR, District Judge.*

DOYLE, Circuit Judge.

The cause before us is an appeal by the State of Oklahoma through the Attorney General of that State, seeking reversal of the judgment of the United States District Court which granted a writ of habeas corpus to the petitioner-

*Honorable George Templar, Senior District Judge, District of Kansas, sitting by designation

appellee herein. The trial court issued the writ and directed the release from custody of the petitioner-appellee Paul [M]. The appeal is pursuant to 28 U.S.C. § 1291.

The petitioner-appellee was convicted following a plea of guilty to the crime of murder on April 13, 1971, and was sentenced to life in prison by the Seventh Judicial District Court of the State of Oklahoma. No appeal was taken from the conviction, but [M] did file a petition for a writ of habeas corpus in the District Court of Oklahoma County. This petition was denied June 3, 1975 and the judgment was affirmed on appeal by the Court of Criminal Appeals of the State of Oklahoma.[1]

[M]'s next step was to file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In that petition, it is alleged that [M's] constitutional rights were violated by reason of the fact that at the time of his conviction, males aged 16 to 18 who were charged with crimes in Oklahoma were tried as adults, while females in the same age group were treated as juveniles unless certified for trial as adults. At the time of the alleged murder petitioner was 17 years of age but close to 18. In his petition he alleged that the discriminatory treatment of males was unconstitutional. The denial of Fourteenth Amendment equal protection of the law is asserted, entitles him to have the conviction vacated and to be released from custody. Petitioner relied on this court's decisions in Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972) and Radcliff v. Anderson, 509 F.2d 1093 (10th Cir. 1974), *cert. denied*, 421 U.S. 939 (1975).

The following points are made by the State of Oklahoma:

1. The federal district court was obligated to require habeas petitioner [M] to re-exhaust newly created state

[1] The petitioner had served approximately ten years in the state prison as of the time of his discharge on habeas corpus writ.

remedies which were not available when the petition was originally filed pursuant to 28 U.S.C. § 2254.

2. The United States District Court, sitting as an Oklahoma court, committed reversible error by suppressing the confession of [M] where it was in conformity with state juvenile law as well as constitutional *Miranda* requirements.

POINT ONE

WAS THE DISTRICT COURT COMPELLED TO SEND THE PETITIONER BACK TO RE-EXHAUST NEWLY CREATED STATE REMEDIES NOT AVAILABLE WHEN THE PETITION WAS ORIGINALLY FILED PURSUANT TO 28 U.S.C. § 2254?

The trial court determined that re-exhaustion was not necessary. We affirm. This court's decision in the case of Lamb v. Brown, *supra*, held that the Oklahoma statute defining a delinquent child as a male under 16 years of age or a female under 18 years was unconstitutional. By virtue of that definition, all males over 16 years of age charged with crimes were treated as adults. On the other hand, females between the ages of 16 and 18 who were charged with crimes were dealt with as juveniles unless certified, after investigation and hearing, to be triable as adults. Because there was no logical justification for discrimination in the treatment of males and females, this court held § 1101(a) of 10 Okla.Stat. to be unconstitutional.

In the case of Radcliff v. Anderson, *supra*, this court held that the *Lamb* decision should be applied retroactively, in spite of a statement to the contrary in the *Lamb* opinion. We found that the denial of a certification hearing before trial as an adult raised concern for basic fairness and essential justice. 509 F.2d at 1096.

In Schaffer v. Green, 496 P.2d 375 (Okla.Crim.App. 1972), the Oklahoma Court of Criminal Appeals ruled, in light of our decision in *Lamb*, that 10 Okla.Stat. § 1101A

was unconstitutional. On April 4, 1972, the Oklahoma Legislature amended § 1101 to define "child" as all persons below the age of 18, thus eliminating any discrimination in the treatment of males and females. The related § 1101A was repealed. An effort was made by the Oklahoma court in Dean v. Crisp, 536 P.2d 961 (Okla.Crim.App. 1975), to revive the last preceding statute which contained a constitutional, non-discriminatory definition of "delinquent child." This was found in Compiled Laws of Oklahoma 1909, Chapter 13, Article I, § 594, which provided that all persons under 16 be classified as juveniles while all over 16 were considered adults. The Oklahoma court concluded that until the 1972 amendment to § 1101, certification hearings were not required.

In Bromley v. Crisp, 561 F.2d 1351 (10th Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), the defendant, while he was 17 and represented by counsel, entered a plea of guilty to a charge of assault and battery with a dangerous weapon. He received a suspended sentence. In March 1974, he plead guilty to two charges of second degree burglary after former conviction of a felony and one charge of robbery with firearms after former conviction of a felony. The sentence was three concurrent 22 year terms. The former conviction premising all three of these recidivist convictions was the assault and battery conviction in 1972 when he was prosecuted as an adult without certification for such treatment. Following the 1974 convictions Bromley sought post conviction relief in the state courts, asserting that the former conviction was invalid under the *Lamb* equal protection holding. He then brought his federal habeas corpus petition, in which his constitutional claim was rejected on the ground that the plea of guilty had waived the prior defects alleged. The appeal in Bromley followed.

The argument by the state on appeal was that the rulings were correct, because the guilty pleas prevented assertion of claims of earlier deprivation of constitutional

rights. This court pointed out that although there are a number of cases which hold that where a guilty plea is voluntarily made it precludes subsequent attack on a conviction, the cases of Blackledge v. Perry, 417 U.S. 21 (1974) and Menna v. New York, 423 U.S. 61 (1975) hold that the preclusive effects of guilty pleas are not applicable where the constitutional claims go to the power of the state to bring the defendant into court to answer the charge brought against him. This court, however, did not rest its decision on that point, but rather took the narrower position that the specifics and merits of the equal protection claims were considered by the Oklahoma courts. Where that is the case, federal courts in habeas corpus suits should likewise entertain the claims.

In *Bromley* v. *Crisp*, this court also rejected the view that the reconstruction of state law offered in Dean v. Crisp, *supra*, cured any constitutional problems created by discrimination against males aged 16 to 18. We took notice that girls were, in fact, given preferential treatment before § 1101 was amended, and boys were, in fact, denied equal protection of the law. However, we recognized that a writ of habeas corpus need not be issued by the federal court in every case where a boy aged 16 to 18 had been tried and convicted as an adult without the benefit of a certification hearing. We found that if the federal habeas court "is clearly convinced that certification would have been made in the state court, the conviction need not be set aside * * *." 561 F.2d at 1357.

In *Bromley* it was also stated that in then-pending federal habeas corpus cases, the district courts should withhold judgment "for a reasonable time to allow the determination to be made in state courts. If the state obtains in the Oklahoma courts a determination that certification would have occurred, the federal district court should deny the writ; if the state court finding is otherwise, the writ should issue." 561 F.2d at 1356, fn. 6. Should no determination be made in the state court, the federal courts

were advised to hold hearings "and make the ruling as to whether or not the court is clearly convinced that petitioner would have been certified for trial as an adult * * *." *Id.* We also approved use of the state test, which provides for certifying "such child capable of knowing right from wrong and to be held accountable for his acts." *Id. See,* Sherfield v. State, 511 P.2d 598 (Okla.Cr.App. 1973).

Based on the *Bromley* v. *Crisp* decision the trial court here, Judge Cook presiding, issued an order dated March 13, 1978 granting the appellant 120 days in which to obtain a state court determination as to whether defendant would have been certified to stand trial as an adult had a certification hearing been held. On May 23, 1978, however, a judge of the District Court of Oklahoma County entered an order in which he found that the state could not invoke the jurisdiction of that court to review the judgment. On November 13, 1980, a hearing was held in the federal district court to determine whether [M] would have been certified to stand trial as an adult. The state presented the testimony of one witness, Officer Richard Mullins of the Oklahoma City Police Department. Mullins was the primary investigator of the underlying murder case here.

When the state attempted to elicit testimony regarding certain statements allegedly made by petitioner [M], counsel for petitioner objected and the suppression question was explored. The petitioner, his mother and his brother testified. The court found that although the officer explained his constitutional rights to the petitioner, as well as to his mother, before questioning petitioner, neither of them could read or write, or understand their rights, and that a knowing, intelligent and voluntary waiver of rights was not made. It was on this basis that the court suppressed the statements. It should be mentioned that the court did not consider the statements for any purpose. An additional piece of evidence was introduced by the state, a file card showing three previous legal incidents involving petitioner. Because the underlying juvenile court rec-

ords had been destroyed, the information on the card could not be verified, nor could the disposition of any of the charges be determined. The trial court found on the evidence presented that petitioner would not have been certified to stand trial as an adult. Following various post hearing motions, the order issuing the writ of habeas corpus was entered. Petitioner was released from custody on April 20, 1981.

The Dean v. Crisp, *supra*, revival of last preceding statute, has been overruled by the Oklahoma court in Edwards v. State, 591 P.2d 313 (Okla.Crim.App. 1979). The *Edwards* opinion held that boys were the victims of unconstitutional discrimination and denial of equal protection. The Oklahoma court also agreed with this court's holding in *Radcliff* that retroactive relief should be granted to boys between 16 and 18 who were prosecuted as adults without the benefit of certification hearings. The *Edwards* order contained the following language:

> [T]he (petitioner) must be able to state to the district court some valid reason to believe that certification would have been denied. If he can do this, then he will be entitled to an evidentiary hearing on the question. The state has the burden to prove by a preponderance of the evidence that waiver of jurisdiction of the Juvenile Court would have occurred had a certification hearing been held.
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> If the state can establish that the (petitioner) would have been certified had a certification hearing been held, then his application for post-conviction relief should be denied. If the state cannot carry its burden, then post-conviction relief should be granted and the (petitioner's) convictions should be vacated. *Edwards* v. *State*, *supra*, at 321-322.

It should be mentioned that the *Edwards* case was decided after the District Court of Oklahoma County determined in

1978 that it lacked jurisdiction to hold a certification hearing on the state's application, but before the certification hearing was held in the federal district court in 1980.

The important inquiry is whether as a result of the *Edwards* case a new Oklahoma remedy was created which required that an effort to re-exhaust be made by petitioner. In the *Edwards* case, a male who was convicted and sentenced as an adult for a crime committed between the ages of 16 and 18 was held to be entitled to an evidentiary hearing in state court on the certification question, if he can state some valid reason to believe that certification would have been denied.

Petitioner has argued that the remedy provided by the *Edwards* decision is ineffectual because it places the burden on the petitioner to state some reason to believe that certification would have been denied, in addition to the facts that he was 16 to 18 years of age at the time of the crime and was denied a certification hearing, before he will be entitled to a hearing. Additionally, petitioner points to language in *Edwards* which indicates that the state need only prove by a preponderance of the evidence that certification to stand trial as an adult would have occurred. 591 P.2d at 321-322. In Bromley v. Crisp, *supra*, this court has held that if a male 16 to 18 years of age at the time of an offense seeks a remedy based on a failure to hold a certification hearing, the state is then required to prove that certification would have occurred. If the hearing is held in federal court, the court must be "clearly convinced" that certification would have occurred. However, we need not and do not reach the assertion that the *Edwards* remedy is ineffective in this case.

We recognize that in certain circumstances, a supervening change in applicable law does require that re-exhaustion of state remedies occur before a federal court may act upon a habeas petition of a state prisoner. Thus, a supervening change in federal substantive law requires

the state courts to be given an opportunity to consider a petitioners contention in the light of such changes. Drennon v. Hess, 642 F.2d 1204 (10th Cir. 1981); Franklin v. Conway, 546 F.2d 579 (4th Cir. 1976); James v. Copinger, 428 F.2d 235 (4th Cir. 1970).

Changes in state procedural law have also been held to require that a federal court stay habeas proceedings so as to permit re-exhaustion. Cf., Case v. Nebraska, 381 U.S. 336 (1965); James v. Copinger, *supra*. The state has relied on Mabry v. Klimas, 448 U.S. 444 (1980). The petitioner had been convicted and sentenced in that case under a recidivist statute. On appeal he argued that some of his prior convictions should not have been admitted into evidence. The state supreme court reduced his sentence to the minimum that could have been imposed had the inadmissible convictions been excluded. Thereafter, petitioner sought a writ of habeas corpus in the federal court alleging that his sentencing was unconstitutional and not remedied by the modification on appeal. The state recidivist statute was amended after the petitioner's trial. The Eighth Circuit found that because the amendment, if applicable to the petitioner, would result in a lower sentence, a writ of habeas corpus should issue unless he was resentenced. The Supreme Court reversed, noting that the state courts had never been presented with the argument that the petitioner was entitled to resentencing by virtue of the amended statute. Our analysis of *Mabry* is that it merely reaffirms the rule that a state prisoner must initially exhaust state remedies before resorting to federal habeas corpus. Picard v. Connor, 404 U.S. 270, 275 (1971). *Mabry* makes it clear that this requirement will continue to apply where an intervening change in state law has given rise to a new theory.

The result differs where, as here, there is an intervening change in state substantive law.

> If the change provides an effective state procedure, * * * or a fundamental variation in substantive fed-

> eral law, the petitioner will generally be required to return to the state courts. If, however, the change is in the substantive state law on the federal issue, federal consideration of the petitioner's claim will generally not be delayed. *Roberts* v. *LaVallee*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967). In the latter situation, the state courts already had the opportunity to consider the petitioner's claim, and the goals underpinning the exhaustion doctrine would not be furthered. Galtieri v. Wainwright, 582 F.2d 348, 355 (5th Cir. 1978).

In the present case, petitioner presented his claim to the state courts in 1975. The state procedure which petitioner invoked would have afforded an adequate forum for consideration of the legal and factual questions presented. *See* 22 Okla.Stat. § 1080, et seq. Probably because of the then controlling state substantive law, the petition was dismissed. The subsequent change in state substantive law did not trigger a re-exhaustion requirement.[2]

In the present case the state courts had an opportunity to consider petitioner's claim, even disregarding the state's request for hearing. The *Edwards* decision made no change in the state post conviction remedy procedure. Rather, *Edwards* altered the substantive law of the state so as to recognize that persons such as petitioner may be entitled to a remedy in certain circumstances.

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[2] Under available Oklahoma procedures, the preferred approach set forth in *Bromley* v. *Crisp*, supra, at 1356, fn. 6, may be best accomplished by withholding judgment for a reasonable time while the petitioner seeks a state court certification hearing under *Edwards*. In this case, in accordance with our *Bromley* guidelines, the district court withheld judgment to permit the *state* to seek a certification hearing in state court. Neither the requirement that state remedies be exhaused nor principles of sound judicial administration mandated that the district court delay the proceedings yet again to require the *petitioner* to return to state court after the decision in *Edwards*.

In Roberts v. LaVallee, 389 U.S. 40 (1967), the Supreme Court held that a similar change in the state substantive law did not give rise to a re-exhaustion requirement. There, an indigent petitioner had requested a free transcript of the testimony of a key state witness rendered at a preliminary hearing. The petitioner asserted his entitlement to such a transcript before his trial, throughout the state appeals process and in state post conviction proceedings. After his application for federal habeas corpus had been filed, the highest state appellate court ruled that denial of free transcripts to indigents is unconstitutional. The Second Circuit held that because the petitioner might now receive the relief he sought in state court, the federal petition ought to be dismissed and re-exhaustion of state remedies should be required. The Supreme Court, however, reversed, holding that repeated applications to state courts are not required in such circumstances. *See also,* Francisco v. Gathwright, 419 U.S. 59 (1974); Wilwording v. Swenson, 404 U.S. 249 (1971); Fay v. Noia, 372 U.S. 391, 423-424 (1963); United States ex rel. Holes v. Mancusi, 423 F.2d 1137 (2d Cir. 1970).

Accordingly, we conclude that it was not necessary for petitioner to re-exhaust state remedies in light of the *Edwards* decision. We note that in its response to petitioner's complaint and petition, the state conceded that the issues raised had been presented to the Oklahoma courts in post conviction proceedings and that state remedies had been exhausted. Moreover, the state did not urge the trial court to return the case to the state court following the *Edwards* decision. Indeed, counsel for the state expressed satisfaction with the federal forum shortly before the certification hearing began and after the trial court had raised the possibility of requiring re-exhaustion. Our finding is, then, that the trial court acted properly on this issue and we conclude that re-exhaustion was not mandated by applicable law.

POINT II

DID THE FEDERAL DISTRICT COURT COMMIT ERROR BY SUPPRESSING THE CONFESSION OF [M]?

It will be recalled that petitioner's statement was taken by an Oklahoma City police officer. The state contends that had the statements been admitted, the trial court would have been required to find that [M] would have been certified to stand trial as an adult. The state maintains that under state law, the confession of a child is admissible if the child's parent was present and if the child and parent were advsied of their legal rights. *See* 10 Okla.Stat. § 1109(a). The state further argues that under Oklahoma law no waiver of rights need be shown. As to federal law, the appellant asserts that petitioner's plea of guilty precludes any claim in this habeas corpus proceeding that his statements are inadmissible. Alternatively, the state argues that the trial court erred in concluding from the evidence presented that [M's] statements were not voluntarily, knowingly and intelligently made.

One of our conclusions is that the evidence supports the trial court's finding that petitioner's statements were not knowingly, voluntarily and intelligently made. The petitioner has argued that the question of the admissibility of his statements is not properly before the court, because the state did not attempt to introduce petitioner's written statement into evidence and because no offer of proof was made after the trial court decided to suppress petitioner's oral statements. Rule 103(a)(2), Federal Rules of Evidence, provides that error may not be asserted based on exclusion of evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." It would appear that the petitioner's oral statements were made known to the court in substance. We note also that counsel for the state have included in their brief the text

of what purports to be the written statement of the accused. As discussed more fully below, the written statement is not part of the record and if the state had wished to make it part of the record, at the very least it should have been formally offered.

The Supreme Court has not yet decided whether the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), apply fully in juvenile proceedings. Fare v. Michael C., 442 U.S. 707, 717, fn. 4 (1979). It is clear, however, that the privilege against self incrimination does apply in juvenile proceedings. In Application of Gault, 387 U.S. 1, 55 (1967), it was said:

> We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. * * * If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was *not the product of ignorance of rights,* or of adolescent fantasy, fright or despair. (emphasis added)

As the Supreme Court recognized in Kent v. United States, 383 U.S. 541 (1966), a certification hearing of this type is of "critical importance." Thus, we find that a confession or admission of a juvenile is not admissible in a hearing on waiver of juvenile jurisdiction unless the statement was made voluntarily and with knowledge of constitutional rights. The Oklahoma Court of Criminal Appeals has so held. The Oklahoma court said:

> When we consider the critical nature of the rights adjudicated at such a hearing, * * * we are compelled to conclude that there is no rational basis for a rule which would permit an illegally obtained confession to be introduced into evidence at a certification hearing when the same confession would be clearly excluded at a

> delinquency hearing or a criminal trial. * * * We hold that it is the duty of the judge of the juvenile court to deny admission into evidence at a certification hearing those statements of a child obtained in violation of constitutional or statutory rights which are inadmissible in delinquency or criminal proceedings. J.T.P. v. State, 544 P.2d 1270, 1276 (Okla.Crim.App. 1975).

See also, C.G.H. v. State, 580 P.2d 523, 525 (Okla.Crim.App. 1978). The Oklahoma courts have given recognition to the proposition that such hearings are of critical importance and have held that confessions are not admissible in such hearings unless there is a knowing and intelligent waiver of the rights to counsel and to remain silent.

In the present case, petitioner, his mother and his brother all testified that at the time of his arrest neither petitioner nor his mother could read or write. Petitioner and his mother both testified that they were incapable of understanding a *Miranda*-type warning of legal rights, even if, as Officer Mullins testified, such a warning was read to them. Testimony also showed that neither petitioner nor his mother knew the meaning of words such as "incriminate" and petitioner did not even know what a lawyer was. Following the hearing the trial court ruled as follows:

> Well, from the evidence that has been presented to the court it seems apparent that Mrs. [M] and Mr. Paul [M] neither could read nor write. No question but that Officer Mullins read to them the document, I don't question his statement there. I have serious doubts though that it had any real meaning to either. It would appear to the court that it was not a knowledgeable, knowing, understanding waiver, and under this testimony I am going to sustain the objection of counsel as to the confession.

The state argues that the trial courts ruling was based exclusively on a finding that petitioner could not read or

write, and that this alone does not render his statements inadmissible. We cannot agree with the state's view of the court's ruling. After reviewing the transcript of the hearing, we are convinced that the trial court could and did find that petitioner and his mother did not comprehend the oral statement of rights. Furthermore, there was testimony to the effect that petitioner requested an explanation and that this was refused, and that petitioner was threatened. Even discounting this evidence on which no express findings were made, we are satisfied that there is ample support in the record for the finding that a voluntary, knowing and intelligent waiver of rights was not made.

In effect the judge stated that he could do nothing other than grant the petition for the writ of habeas corpus for the reason that there was nothing in the record except the card showing petitioner's juvenile court record. In other words, the only evidence that the state offered consisted of oral statements of the accused made to the officers prior to the time the written statement was prepared The trial court ruled all of this out and rightly so. Inasmuch as it had been reduced to writing there was certainly good reason to exclude the preliminary admissions that led up to the giving of the confession. However, the state at no time offered the written confession and it is not properly in the record. Prior to oral argument in this appeal, the state filed a motion to correct the record, seeking to add three exhibits inadvertently omitted from the record on appeal. This court granted the motion. One of these "exhibits" was petitioner's written statement. The Clerk of the District Court, however, refused to certify the written statement because it had never been made a part of that court's records. It is true that the state delivered the statement to the Clerk of the Court, who forwarded a copy to this court. However, I can say that no one of the panel has read this statement and should not because it was not made a part of the record. The trial court did not even make a ruling on it. The state should have tendered

the statement; at least the tender would have made it a part of the record. In short, there is not a scrap of evidence here that would justify a positive ruling in favor of the state. We read the trial court's conclusory remarks as being, in effect, in the nature of reasons for entering a default judgment against the state.

One further point that the state has argued is that petitioners guilty plea serves as a waiver of any claim that his statements are inadmissible. This, of course, is separate and distinct from the question just considered, namely the failure to admit the confession or the oral admissions. No argument based on the legal effect of the guilty plea was made when the trial court was considering the admissibility of the confession or as a part of the state's motion to reopen. The trial court and the petitioner were at liberty to assume, if the question was considered, that the state had decided not to rely on the guilty plea. It is seldom that we can consider on appeal issues which were not raised in the trial court and we see no legal justification for departing from that rule here.

Our conclusion is that the trial court ruled correctly and in the only way possible in view of the condition of the record and, although we are unenthusiastic about this result, we are constrained to determine the cause on the record which is presented.

For the reasons set forth above we conclude that the judgment granting the writ of habeas corpus must be and is hereby affirmed.

[Filed February 16, 1982]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RICHARD CRISP, Warden, et al, Appellants	)	
v.	)	No. 81-1289
PAUL [M], Appellee	)	

Appeal from the United States District Court
For the Eastern District of Oklahoma
(D. C. No. 75-249)

Jan Eric Cartwright, Attorney General of Oklahoma; Charles S. Rogers, Assistant Attorney General, Deputy Chief, Criminal Division, and Michael Avant-Pybas, Assistant Attorney General, Oklahoma City, Oklahoma, for the Appellant

Fred P. Gilbert, Attorney for Appellee

Before McWILLIAMS, and DOYLE, Circuit Judges, and TEMPLAR, District Judge*

DOYLE, Circuit Judge

OPINION ON REHEARING

The State of Oklahoma, through the Attorney General, Jan Eric Cartwright, has filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The two points which

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*Honorable George Templar, Senior District Judge, District of Kansas, sitting by designation

are emphasized in the motion are *first*, that the state court remedies had not been exhausted. The *second* point is that the federal trial court erred in excluding the admission and confessions of defendant at the habeas corpus hearing.

We requested the response to the petition for rehearing from counsel for the petitioner, and the matter stands submitted.

I.

The emphasis here is placed upon the fact that the Oklahoma Court of Criminal Appeals rendered a decision in Edwards v. State, 591 P.2d 313 (Okla.Cr. 1979), in which it carved out a new state remedy in the Oklahoma courts for petitioners who were claiming entitlement to the retroactive application of a denial of equal protection in juvenile transfers to adult courts. The contention is that in such circumstances the petitioner must re-exhaust state remedies.

The *Edwards* decision was rendered February 14, 1979. For the first time Oklahoma gave recognition to age discrimination contained in the Oklahoma statute. The opinion condemned the practice of treating males over the age of *16 years* as adults and subject to adult sanctions and procedures. Females between the age of *16 and 18 years* were treated as juveniles unless they were certified for trial as adults. Thus, the pre-*Edwards* rule was that males between the ages of 16 and 18 could be tried as adults without certification hearings. Females between 16 and 18 were triable as adults, but only if they were certified following a certification hearing. The *Edwards* court held that this was unconstitutionally discriminatory, in that it was in violation of the equal protection clause of the Fourteenth Amendment and discriminated against males. The court further held that in proceedings to determine whether retroactive relief could be granted an individual who, during the period between age 16 and 18, was transferred to adult court without certification, could obtain an order in

state court overturning his conviction only if a finding was made that the individual would not have been certified if a certification hearing had been held. If such an individual could present such a reason and the state could not establish that the individual would have been certified, then the district court could grant appropriate relief. The remedy itself was narrow but it did wipe out the Oklahoma ruling in Dean v. Crisp, 536 P.2d 961 (Okla.Cr. 1975). There the Oklahoma court had held that the effect of several federal court rulings condemning the discriminatory procedure was merely to resurrect an early statute which treated both boys and girls under the age of 16 as juveniles, while those beyond the age of 16 were adults. Thus, it denied juvenile status to all children who were above the age of 16 years. *Edwards* overruled *Dean* v. *Crisp, supra.*

Our decisions in Lamb v. Brown, 456 F.2d 18, and Radcliff v. Anderson, 509 F.2d 1093, preceded the Oklahoma decision in *Dean* v. *Crisp.* Bromley v. Crisp, 561 F.2d 1351, was subsequent to *Dean* v. *Crisp.* All of the mentioned decisions recognized the discrimination which the Oklahoma courts were practicing. It was not until *Edwards* overruled *Dean* v. *Crisp* that there was a recognizable change. It was during the reign of *Dean* v. *Crisp* that the present habeas corpus proceedings came before the United States District Court for the Eastern District of Oklahoma. Following a preliminary hearing, the then Judge, Joseph W. Morris, gave the petitioner 120 days from the date presented in which to secure a state court determination as to whether the petitioner would have been (in 1970) certified as an adult for state criminal prosecution. Judge Morris at that time stated that the state courts unquestionably are qualified because of their expertise and daily experience to make the decision as to whether adult certification should have occurred. However, on that occasion Judge Morris declared that if the state court determination was not submitted to his court within 120 days

from the date, the writ would issue unless an extension of time was given. On June 27, 1978, the then Attorney General, Mr. Derryberry, reported to the court with a written notification of state court action, stating that the Attorney General's office had referred the matter to the District Attorney of Oklahoma County for appropriate action, and that an application to set a hearing was filed by an Assistant District Attorney. Then, on May 23, 1978, the notification stated, the Honorable Harold Theus, presiding Criminal District Judge, entered an order stating that the District Court of Oklahoma County did not have jurisdiction to review the conviction.

The notification went on to say that pursuant to this court's decision in Bromley v. Crisp, 561 F.2d 1351 (10th Cir. 1977), the State (of Oklahoma) was requesting the United States District Court to conduct a hearing to determine whether or not the petitioner would have been certified to stand trial as an adult. The basic impediment at that time was that the Oklahoma decisions refused to recognize the constitutional violation which resulted from the discrimination.

The Oklahoma Attorney General *now* argues that the federal courts failed to take into account the strong public interest in certification which the State of Oklahoma had. This is subject to question, but one thing which was plain was that no remedy was available in Oklahoma courts until *Edwards* was handed down in 1979. Thus, habeas corpus petitions were futile efforts until *Edwards*.

On November 30, 1978, United States District Judge H. Dale Cook, sitting in the Eastern District of Oklahoma, entered an order which recited that acting on the authority of Bromley v. Crisp, 561 F.2d 1351, *cert. denied*, 435 U.S. 908, 120 days had been granted for determination by the state court as to whether petitioner would have been certified as an adult for other state prosecution. Judge Cook noted that the 120 days for submission of a state court

determination had expired and the Oklahoma court had not decided the issue. Accordingly, respondent was ordered to show cause within 20 days why the writ should not be issued forthwith.

The Oklahoma Attorney General responded that in view of the statement of the District Court of Oklahoma County (which rejected the submission), the State of Oklahoma could not entertain the case because of a lack of jurisdiction. The Attorney General continued: "It is submitted that only the defendant in a criminal action may petition the state district court for a review of the state court conviction. Thus, the failure of petitioner to invoke the jurisdiction of the district court and obtain a state court ruling as to whether he would have been certified should not preclude the State of Oklahoma from petitioning this court (the federal court) for a hearing to be conducted pursuant to the guidelines of Bromley v. Crisp, * * *." The response continued: "As reflected in Bromley, *supra*, in note 6 at page 1356, the federal district court may have the hearing and make a ruling as to whether or not the petitioner would have been certified for trial as an adult if the state court fails to make such a ruling." The Attorney General suggested that the federal court should conduct the hearing to determine whether or not the petitioner would have been certified for trial as an adult.

This is not the situation, as suggested in the motion for rehearing, that an unauthorized assistant attorney general expressed satisfaction in having the federal court decide the issue. Assistants act on behalf of the Attorney General. The Attorney General acknowledged that the State of Oklahoma was unable to invoke the jurisdiction of the state court. The Attorney General stated that the federal courts should determine the crucial issue whether, had it been considered ten years before, a certification to adult court would have issued.

Subsequent to the proceedings that are described above the decision of the Oklahoma Court of Criminal Appeals

in *Edwards* v. *State* was handed down. Our decision in *Bromley* v. *Crisp, supra,* had recognized that in then-pending habeas cases the federal district court should withhold judgment for a reasonable time to allow the determination to be made in the state courts. If the state obtained a determination that certification would have occurred in the Oklahoma courts, federal district courts should deny the writ; if the state court found otherwise, the writ should issue. 561 F.2d at 1356, fn. 6. In the event no determination was made in the state courts, however, the federal courts were advised to hold hearings "and make the ruling as to whether or not the court is clearly convinced that the petitioner would have been certified for trial as an adult * * *." *Id.* This was the setting when Judges Morris and Cook sought to obtain a ruling from the state district court, or failing that, to proceed with the case. No state hearing was either forthcoming or likely and so Judge Cook, with the consent and approval of the Oklahoma Attorney General, proceeded to hear the issue as best he could. The failure of the Attorney General to present a showing is not surprising.

Efforts had been made by the petitioner to submit this remedy in the state court. The petitioner had been denied relief in the Oklahoma district and appeals courts. The federal court submission was not likely to succeed, but the Oklahoma court showed no enthusiasm for having the case. In view of the happenings, it is difficult to see how the State of Oklahoma can now claim that as a result of the *Edwards* decision there must be further pursuit of a state court decision.

We are not saying that there was a waiver by the state. We are saying that the defendant made a bona fide and adequate effort to pursue and exhaust state remedies, and in view of the action taken by the state, it should not be heard to say that the proceedings were inadequate because of failure to re-exhaust his remedies.

We are aware that supervening changes in federal *substantive* law require that the state court be given an opportunity to consider petitioner's contention in light of such changes. Drennon v. Hess, 642 F.2d 1204 (10th Cir. 1981); Franklin v. Conway, 546 F.2d 579 (4th Cir. 1976); James v. Copinger, 428 F.2d 235 (4th Cir. 1970).

Supervening changes in state *procedural* law have also been held to require that a federal court stay habeas corpus in order to allow re-exhaustion. *Cf.* Case v. Nebraska, 381 U.S. 336 (1965). *See* James v. Copinger, *supra.*

The state relies on Mabry v. Klimas, 448 U.S. 444 (1980). There petitioner had been convicted and sentenced under a recidivist statute. On appeal he successfully argued that some of his prior convictions should not have been admitted into evidence. The State Supreme Court reduced his sentence to the minimum had the inadmissible convictions been excluded. The petitioner there was not satisfied He filed a habeas corpus in federal court, alleging that the entire sentencing was unconstitutional. The Supreme Court held that he had never exhausted his remedy as to the invalidity of the sentence as a whole. Thus, *Mabry* is not applicable here because no such problem exists. The state was given ample opportunity to consider and decide the case. *Mabry* is not a case of re-exhaustion.

The case of Roberts v. LaVallee, 389 U.S. 40 (1967) bears a closer similarity than anything that is presented by the state. Petitioner in that case had requested a free transcript of the testimony of the key state witness rendered at the preliminary hearing. At every level he asserted his entitlement, through the trial and through post-conviction proceedings. The Second Circuit held that after the highest state court had ruled that denial of free transcripts to indigents was unconstitutional, petitioner might now receive relief in the state courts, and that the federal petition ought to be dismissed and re-exhaustion should be required. The Supreme Court reversed, holding that

repeated applications to state courts are not required in such circumstances. We say that the case here is governed by *Roberts* v. *LaVallee*. It is not seriously disputed that there was exhaustion in this case at the outset. The only point that the state now makes is that *Edwards* brought about a procedural change requiring re-exhaustion. We disagree in view of the peculiar circumstances presented. First Oklahoma refused to recognize the constitutional violation for many years. Meanwhile, the Attorney General, in effect, conceded that no action was to be expected from the Oklahoma courts and approved a hearing by the federal court. Further exhaustion was likely to prove futile. The Attorney General recognized this fact, as shown by his suggesting that the federal court hear the issue.

II.

The next contention is that the oral and written statements of the petitioner should have been received in evidence at the habeas hearing to determine whether a certification to the district court would have occurred ten years before. These statements constituted the only evidence offered by the state in the hearing before Judge Cook. The only witness on behalf of the state was the officer who conducted the investigation and who questioned the petitioner [M]. His testimony was devoted to the circumstances surrounding the taking of the statements, and an effort was made by the Assistant Attorney General to introduce all the oral statements that the accused had given, together with the written statement. Although the written statement was not actually tendered in evidence, the court rejected it, nevertheless, and did so on the ground that [M] had not had a lawyer and seemingly did not understand his rights, even though a *Miranda* warning was given by Sgt. Mullins, who conducted the questioning over a long period of time. The testimony from [M] was that he did not understand what the confession was; that he did not understand the wording, including the function of a lawyer, as he was unable to read. He also said that no one read

the document to him. He testified that he was seventeen and was a seventh grade drop-out. He denied that he understood the words "right to counsel" nor did he understand the meaning of the word "incriminate"; he never had an attorney, nor had he ever talked to one. His mother testified that she was unable to read or write, and that his father was unable to read or write. She indicated that he did not know what he was signing.

The legal basis for the objection at this collateral hearing was the critical importance of the certification hearing to the juvenile. The conclusiveness of this hearing justified the objection to its admission and its exclusion, even though the issue at stake was not guilt or innocence. The authority relied on was Application of Gault, 387 U.S. 1, 55; also J.T.P. v. State, 544 P.2d 1270, 1276.

Finally, the only other evidence tendered by the state was the card which purported to show the juvenile court record of the petitioner. The contents of the record were not revealed. The purpose was to show that the records existed.

The Assistant Attorney General, with commendable candor, acknowledged that the evidence bearing on the question of the admissibility of the statement was that the entries on the card could not be verified because the files were shown to have been destroyed. It was said by the Attorney General that "those two (the statement and the card) and I would have to agree with Mr. Gilbert, attorney for the petitioner are very scant reasons for this court to find that Mr. [M] would have been certified as an adult, in light of the fact that there are certain due process guarantees which Mr. [M] is afforded when he is a juvenile." An additional statement was made that not much evidence existed to show that he would have been certified; that the district court records had been destroyed, this case having been held ten years before.

It is not surprising that Judge Cook rejected the statements. The state was relying on an invalid confession and invalid admissions as its only evidence in seeking to establish that [M] would have been certified. Granted that confessions are generally offered to establish guilt, it does not follow that an invalid confession should be received to justify transfer to district court ten years afterward.

* * * *

A further point was tacked on by the Attorney General in the motion for rehearing which was not expressly raised at the hearing. That was that the defendant's plea of guilty barred him from presenting a collateral attack upon the conviction. This has been discussed in the opinion. It is rendered inadequate by the fact there was not a counseled, intelligent, deliberate understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief. Nor is this a case in which there has been deliberate by-pass of the orderly procedure of state courts, whereby the petitioner has forfeited his state court remedies. *Cf.* Fay v. Noia, 372 U.S. 391 (1963). Indeed, it is a far cry from anything that faintly resembles any manipulation by the petitioner. Although, as pointed out in the opinion, the state asserts that petitioner had the assistance of counsel in connection with his plea of guilty, the record fails to support this. See Menna v. New York, 423 U.S. 61 (1975), including the footnotes on pages 62 and 63, and Blackledge v. Perry, 417 U.S. 21 (1974).

We do not find fault with the Attorney General's motion for rehearing because of the fact that it resembles a brief more than a petition for rehearing, for it does make as strong a showing as can be made. However, it does not provide a basis for granting a rehearing.

We, therefore, determine that it should be, and it is hereby, denied.

APPENDIX E

INTERROGATION; ADVICE OF RIGHTS
YOUR RIGHTS

Place *OCPD Youth Bureau*
Date *11-5-70*
Time *10:35 AM*

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advise before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed *Paul [M]*

1) Witness: *May [M]*
2) Witness: *Det. Bill Baldwin*
   Time: *10:35 AM*
3) Witness — *Richard Mullins*

APPENDIX F

OKLAHOMA COUNTY
STATE OF OKLAHOMA

VOLUNTARY STATEMENT

DATE: *11-5-70* PLACE: *Oklahoma City Police Department*

RELATIVE TO: *Homicide of Willie Eugene Droke Wm-33*

LOCATION: *Alamo Plaza Motel room #1402*

OCCURRING: *10-1-70 12:30 am*

TIME STATEMENT STARTED: *1:05 pm*

I, the undersigned, PAUL [M] *of 2940 S.W. 15th, Oklahoma City,* being, *17* years of age, born at *Oklahoma City Oklahoma* on *11-21-52* do hereby make the following statement to *Richard Mullins and Bill Baldwin* they having first identified themselves as *police officers,* knowing that I may have an attorney in my behalf present and that I do not have to make any statement nor incriminate myself in any manner. I make this statement voluntarily, of my own free will, knowing that such statement could later be used against me in any court of law, and I declare that this statement is made without any threat, coercion, offer of benefit, favor offer of favor, leniency or offer of leniency by any person or persons whomsoever, and that if I cannot afford an attorney, that one will be appointed by the court free of charge.

Q. Mr. [M], do you understand the heading of this statement?

A. Yes.

Q. Mr. [M], do you have knowledge of the homicide of Willie Droke, which occurred on the above mentioned date and time?

A. Yes.

Q. Mr. [M], would you explain in your own words, from the beginning reference what actually happened?

A. At first me an willie rented the motel room, at the Alamo Plaza motel, and we went over there and had a few drinks of beer and vodka, and they gave me some kind of marijuana and put some white powder in my beer. We went and picked up Earl Van Denton at his house, in Willie Droke's car. We went and took Earl back to the motel and started drinking beer, vodka too. Then I passed out about an hour after I I was over there. Him and Willie Droke were having some kind of sex affair, and I had passed out, WILLIE and EARL left, Willie came back to the motel and woke me up, and told me that he and Earl hadhad sex together. Then we got up out of bed and he took me home, and thensaid that he had to go to work.

He asked me to meet him at about 6:30pm that night, at my house. He had another kid in the car by the name of Daniel, and then we went back over to the Alamo Plaza Motel, and started drinking again. Willie and Daniel were having another sex affair, and then about 10:00pm we took Daniel home and went over and picked Earl up. We got to th Alamo Plaza and started drinking again, I don't remember the exact date but it was the last part of September. We had stopped and gotten Beer and fritos before going back to the motel. We got back over there and Willie Droke gave me some pillsevery time I would open a can of beer and take a drink out of it, I'd set it down and go to the restroom and when I'd come back half of it would be gone and it would taste funny. Willie Droke said that he had better not catch my brother Charles out on the streets, because Rocky had told him something about him. Then we started arguing and I hit Willie Droke on the forehead with my fist. I got back up to get a drink and he kicked me and then he hit me with his hand, then Willie got up and grabbed the phone, to call the switchboard, after Earl had hit him

with a 7-up bottle approximately 10 times in the head and face, Willie was bleeding, in the back of the head and EARL had hit him with his fist, and Willie's eye was swollen up. Earl tore the telephone, XXXXXX XXXXXXXXXXXXXXXX causing the wire to be disconnected. When Willie and Earl started struggling and Willie's head was bleeding and I had given him a towel to put over his head. Earl told him to get in the car, and we walked out of the motel and Willie was in front, Earl behind Willie and I was behind Earl. Willie walked around and got in and got into the right side of the car into the rear seat with a towel over his head, this was Willie's own car that they got into, which was parked right beside the room at the motel.

EARL drove the car from the motel, and I was sitting in the front seat, then EARL said let's tie him up, Willie's head was leaning back with a towel wrapped around his head. Then we took some road to Blanchard, I had passed out and we were in some kind of a country in Blanchard, and EARL thought that Willie had a gun in the back of the trunk. We parked the car then Earl got out to check to see if Willie had a gun in the trunk, he came back with a tire tool and a shovel. I was sitting inside the car and willie was still in the back seat. Then Earl put the tire tool in the front floorboard, then he took the tire tool back of the car, and laid the shovel down beside the car took the tire tool aroundon Willie Droke's side and told Willie to get out of the car, and Willie got out of the car and I got out of the car, and when Willie got out of the car he was standing up, Earl hit him with a tire tool in the back of the head about three or four times, knocking him down. It was a single lug tire tool, then Earl, after Willie had fallen down had hit him with the shovel on the back of the head twice. Willie got up and ran around to the driver's side of the car got inside, EARL came around, Willie got back out of the

car, he didn't get very far past the back of the car, and Willie had fallen down, then Earl got back in the car and started it up, did about 30 mph making a "U" turn, and Willie Droke said "he is going to run over us". I had step back beside Willie who was laying down, and he stopped the car in front of me and Willie, and Earl got out of the car, took the shovel hit Willie one time on the side of the head and he was still breathing, being Willie, and I had passed out twice out there, and Earl looked at me as if he were going to hit me with the tire tool. Earl got the shovel and started digging, and I dug some and then Earl started digging grave, pretty well deep, and then we drug his body over the grave, put him in there and he had a cloth or something over his face, Earl took Willie's shirt, socks, and shoes off, no he did' not take his shirt off, and then started to cover him up. He was still breathing and I told Earl this. After he was covered up he started to get out of the grave, I could see some dirt moving as if he were trying to get out. Earl had took the car, and run over the grave about 15 times, and then we drove back to Oklahoma City, Earl drove the car. Before we drove back to Oklahoma City Earl threw the tire tool and the shovel into what I believed was a pond about 3 blocks from the grave. I was facing north and earl got the tire tool up as if he were going to throw it, I moved out of the way and then he threw it into the pond, it didn't lack much of hitting me. And I thought that he was going to hit me with the tire tool. Earl drove the car back to Oklahoma City, parked it outside on the street at the Alamo Plaza Motel, took the key to the room back into the room, and then we left and got a ride on Agnew from Falvial Moore, this was about 8:00 am in the morning. I went home and then they took Earl HOme. Earl kept Willie's camera, and he must have taken his watch and ring.

I later left Oklahoma City and went to California.

Q. Mr. [M], what time do you think that you arrived at the area where MR. DROKE was buried?

A. About 1:00am or 1:30am.

Q. Mr. [M], is there anything else that you would like to add to this statement?

A. Willie Droke and Earl gave me some pills to take and some white looking powder, and then after that I was dizzy and did not know what was going on, I mean my mind was blank.

I, *Paul* [*M*] have read this statement consisting of *2* pages and do hereby state that the facts contained therein are true and correct.

Signed: *Paul* [*M*]

WITNESS: (s) *May* [*M*]
(s) *Det. Richard Mullins*
(s) *Det. Bill Baldwin*
(s) *Lee Ann Davis*

[Acknowledgment and certification omitted in printing]

APPENDIX G

CRF - 70- 3097

INFORMATION

[Filed October 22, 1970]

IN THE DISTRICT COURT, IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA	)	
Plaintiff,	)	
vs.	)	
	)	INFORMATION
EARL VAN DENTON	)	
and	)	
PAUL [M]	)	
Defendant.	)	

In the name and by the authority of the State of Oklahoma, comes now CURTIS P. HARRIS the duly elected, qualified and acting District Attorney in and for Oklahoma County, District No. 7, State of Oklahoma, and on his official oath gives the DISTRICT Court in and for said Oklahoma County, State of Oklahoma, to know and be informed that heretofore, to-wit:

On or about the 1st day of October A.D., 1970, in Oklahoma County, State of Oklahoma

EARL VAN DENTON and PAUL [M]

whose more full and correct names are to your informant unknown, then and there being, did then and there wilfully, unlawfully and FELONIOUSLY commit the crime of

MURDER (21 O.S.A. 641)

in the manner and form as follows, to-wit:

That is to say, the said defendants, acting conjointly and together, in the county and state aforesaid, and on the day and year aforesaid, then and there

being, did then and there wilfully, unlawfully, wrongfully and feloniously, without authority of law, and with a premediated design to take the life of WILLIE DROKE, make an assault on WILLIE DROKE by beating and striking the said WILLIE DROKE on and about the head and face with a telephone receiver, then and there had and held in the hands of the said defendants, then and there and thereby inflicting upon the head and face of him, the said WILLIE DROKE, by said beating as aforesaid, certain mortal wounds of which said mortal wounds so inflicted as aforesaid, he, the said WILLIE DROKE did die on or about the 1st day of October, 1970, as was intended by the said defendants;

[Court Clerk certification stamp omitted]

contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Oklahoma.

CURTIS P. HARRIS
District Attorney, District No. 7
Oklahoma County, Oklahoma

By (s) *Clay Wise*
Assistant District Attorney

[Oath of R. Mullins, Certification, and List of Witnesses of this Information omitted in this printing.]

[APPENDIX]

[Filed Apr. 13, 1971]

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	]	
vs.	]	No. CRF-70-3097
Paul [M], Defendant.	]	

PLEA OF GUILTY, SUMMARY OF FACTS
(One or more charges)

1. Is the name just read to you your true name? A. *Yes sir.*
2. How old are you now? A. *18* years of age.
3. Is Mrs. *Corrigan* your lawyer? A. *Yes.*
4. You know you are charged with *Murder*? A. *Yes.*
5. Have you and your lawyer had a copy of the charges? A. *Yes.*
6. Do you know that the punishment provided for the crime(s) is imprisonment for *life or death*? A. *Yes.*
7. Do you understand that on plea(s) of guilty you may be sentenced to a term of imprisonment within these limits? A. *Yes.*
8. You know that you are entitled to jury trial on the charges(s), (and on each one of the charges)? Do you want a jury trial? A. *No.*
9. Have you talked over the charge(s) with your lawyer, understand your rights, and had his advice in the matter(s)? A. *Yes sir.*
10. Do you wish to enter your plea now and be sentenced now? A. *Yes.*

[APPENDIX]

11. What is your plea(s) to the charge(s)? A. *Guilty.*

12. Do you plead guilty of your own free will, only for the reason that you are guilty and you admit that you did all the acts charged? A. *Yes, but we did it with a tire tool instead of telephone receiver.*

13. Have you been abused, mistreated, or threatened by anyone to have you enter your plea(s)? A. *No sir.*

14. (Recommendation for sentence): *Life imprisonment (Assis D.A. Duane Miller)*

15. You and your attorney heard the recommendation? A. *Yes.*

16. Do you or your attorney know of any reason why you should not be sentenced in accordance with this recommendation? A. *No.*

17. Memorandum of Sentence: *Life imprisonment*

18. You have the right to file a petition in the Court of Criminal Appeals for a Writ of Certiorari, that is a request for the Court to review this judgment and sentence. It may be granted or denied. Do you understand that? A. *Yes.*

19. Petition for a Writ of Certiorari must be filed in the Court of Criminal Appeals within ninety (90) days from this date. Notice of such filing must be given within five (5) days thereafter by serving a copy of the petition for Writ of Certiorari on the prosecuting attorney, who prosecuted petitioner, and on the Attorney-General. Do you understand that? A. *Yes.*

20. Have you fully understood the questions that have just been asked you, and the answers you have given to each question, and are they your free and voluntary answers to these questions as made? A. _____

21. Above done in open Court this *13* day of *April*, 19____

22. (This is to be filed in the case as a part of the trial minutes).

(s) *Duane H. Miller*
Assistant District Attorney

(s) *JoAnn Fisher Corrigan*
Attorney for Defendant

(s) *Paul [M]*
The Defendant

(s) *Harold C. Theus*
DISTRICT JUDGE

(s) *Dolores Drumm*
Official Court Reporter Present

(s) *M. Emerson*
Deputy Court Clerk Present

[Filed April 13, 1971]

THE STATE OF OKLAHOMA)
OKLAHOMA COUNTY) SS

In the District Court of the Seventh Judicial District
of the State of Oklahoma,
Sitting in and for Oklahoma County, Oklahoma

THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
-vs.-	)	No. CRF-70-3097
	)	
PAUL [M]	)	
Defendant.	)	

JUDGMENT AND SENTENCE
ON PLEA OF GUILTY

Now, on this *13th* day of *APRIL*, 1971, the same being a juridicial day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause

coming on for judgment, and the defendant *PAUL [M]* being personally present in open court, and being duly represented at all appearances before the court by his attorney of record, *JO ANN FISHER CORRIGAN* and having been legally charged with the offense of *MURDER* and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly entered his plea of guilty to the crime of *MURDER* after having been duly advised of his rights and the effect of such plea; and the defendant having been asked by the court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of *MURDER*.

It is Therefore, Ordered, Adjudged and Decreed by the Court that *PAUL [M]* is sentenced to a term of *LIFE IM*-PRISONMENT under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Oklahoma State Penitentiary at McAlester, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department, for the crime of *MURDER* said term of sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at McAlester, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at *$22.50*, for which judgment is hereby rendered against the defendant, and thereupon the defendant is by the court notified of his right of appeal.

It is Further Ordered, Adjudged and Decreed by the court that the Sheriff of Oklahoma County, Oklahoma, transport said defendant to the said State Penitentiary at McAlester, Oklahoma, and that the Warden of said penitentiary detain the said defendant according to this judg-

ment, sentence and order, and that the clerk of this court, do immediately certify, under the seal of the court, and deliver to the Sheriff of Oklahoma County, Oklahoma, two copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said penitentiary at McAlester, Oklahoma, and to be left therewith at the said penitentiary, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma County, Oklahoma, for the transportation and imprisonment of the said defendant as herein before provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.

(s) *Harold C. Theus*
HAROLD C. THEUS, District Judge

(Seal)

Attest:
DAN GRAY,
Dan Gray, Court Clerk

By (s) *Mary Evelyn Moncrief*, Deputy Court Clerk

[Certification and Sheriff's Return omitted in printing]

APPENDIX H

[Filed June 6, 1975]

IN THE DISTRICT COURT,
OKLAHOMA COUNTY, OKLAHOMA

THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	District Court
vs.	)	Case No.
	)	No. CRF 70-3097
PAUL [M],	)	
Defendant.	)	

No. *82399*

Address: *McAlester, Oklahoma*

POST CONVICTION FINDINGS
(Title 22, O.S. Supp. 1970, § 1080 et seq.)

Original Charge: *Murder, 21 O.S. 1961, 701 et seq.*

Judgment and sentence: *Life imprisonment*

Application for Post Conviction Relief filed: *May 28, 1975.*

Response of District Attorney: *Denied — June 3, 1975.*

Was form authorized by Court of Criminal Appeals used? A. *No.*

Proceeding in Court of Criminal Appeals, if any: *None.*

Is there a genuine issue of material fact? A. *No.*

Is an evidentiary hearing necessary? A. *No.*

Is the testimony of the trial Judge material to such a hearing? A. *No.*

Findings of fact: *The crime was committed on or about October 1, 1970. Defendant was seventeen [17] years of age and would have been eighteen [18] on November 10, 1970.*

[APPENDIX]

Conclusions of law: *In the case of Freshour* v. *Turner*, Okl. Cr., 496 P.2d 389, *the following language is applicable to the matter now before this Court:*

> *"An infant who committed a criminal act between 1941 and March 16, 1972, and had not reached his fourteenth birthdate on the date of the commission of the alleged offense must have a certification hearing in Juvenile Court to determine if he or she should be held accountable for his or her acts. If, between 1941 and March 16, 1972, they had passed their fourteenth birthdate at the time of the commission of the criminal act, it is legally presumed they knew the wrongfulness of their acts and no juvenile proceedings are required."*

Order: DENIED Notice: You are entitled to appeal from this Order by filing, in writing, with the Clerk of this Court, within ten (10) days from this date, your notice of Appeal.

Date: *June 5, 1975.*

(This order to be filed by the Clerk as part of the minutes in this case.)

Mailed to Petitioner this *6th* day of *June*, 1975.

(s) *Gar Graham*
DISTRICT JUDGE

[Filed July 3, 1975]

IN THE COURT OF CRIMINAL APPEALS,
STATE OF OKLAHOMA

PAUL [M],	]	
Appellant,	]	
-vs-	]	
	]	No. PC-75-352
THE STATE OF OKLAHOMA,	]	
Appellee.	]	

ORDER AFFIRMING DENIAL OF
POST CONVICTION RELIEF

Appellant Paul [M] has filed in this Court an appeal from an order of the district court, Oklahoma County, denying his application for Post Conviction Relief in District Court Case No. CRF-70-3097. Alternatively, he designates the pleading filed herein a petition for writ of habeas corpus.

Appellant asserts that his conviction in Case No. CRF-70-3097 for the crime of murder is void for the reason that he was a 17-year-old male at the time of the commission of the crime and was not certified by the juvenile court to stand trial as an adult, which certification was a jurisdictional prerequisite for a like-aged, similarly-offending female. He asserts his conviction was, therefore, unconstitutional as violative of the fourteenth amendment's guarantee of equal protection. He relies upon the decision of *Radcliff* v. *Anderson*, 509 F.2d 1093 (10th Cir. 1975).

Dean v. *Richard Crisp and The State of Oklahoma*, Okl.Cr. ___ P.2d ___ (46 OBAJ 1052), is dispositive of this issue. In that case this Court rejected the reasoning of *Radcliff* v. *Anderson*, supra, and held that if a defendant in a criminal case prior to April 4, 1972, had reached his sixteenth birthday he was not a child within the definition of the controlling statutory provision, compiled Statutes of

Oklahoma of 1931, Chapter 14, Article 4, § 1729 and hence certification proceedings by the juvenile court were not necessary.

Petition for Writ of Habeas Corpus DENIED. Order of the District Court AFFIRMED.

SO ORDERED.

(s) *Hez J. Bussey*
HEZ J. BUSSEY, Judge

(s) *C. F. Bliss, Jr.*
C. F. BLISS, JR., Judge

ATTEST: *Ross N. Lillard, Jr.*, Clerk

APPENDIX I

[Filed March 13, 1978]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

PAUL [M],	)	
Petitioner,	)	
v.	)	No. 75-249-C
	)	
RICHARD CRISP, Warden,	)	
Oklahoma State Penitentiary,	)	
Respondent.	)	

MEMORANDUM OPINION

Petitioner, who is in the custody of the State of Oklahoma, has, through his attorney, filed a pleading entitled petition for writ of habeas corpus, wherein he seeks primary relief by means of habeas corpus allegations, requesting release from penal imprisonment by the State of Oklahoma. In the alternative, he requests relief under the Civil Rights Act, under the provisions of 28 USC 1331, 1343. The defendant filed a motion to dismiss both parts of plaintiff's complaint, which purported to state a claim under the Civil Rights Act. Said motion was denied by order of this Court dated March 21, 1976. The defendant filed an answer on April 12, 1976, with attachments, which included a copy of the information charging the plaintiff, Paul [M], with Murder under provisions of 21 Okla. Stat. 641, copies of the Disposition Docket dealing with [M's] case in Oklahoma County, Oklahoma, i.e. Case No. CRF-70-3097, and a pleading entitled Plea of Guilty and Summary of Facts for Case No. CRF-70-3097, and Judgment Sentence on Plea of Guilty, dated April 13, 1971, as well as copies of orders of the Federal District Court for the Northern District of Oklahoma and the Western District of Oklahoma.

The facts, as set forth in the plaintiff's complaint and not disputed by the defendant, indicate that the plaintiff, on October 1, 1970, when he was 17 years of age, was charged with the offense of Murder under the provisions of Okla. Stat. 641. That thereafter, plaintiff, with advice of counsel, entered a plea of guilty in Case No. CRF-70-3097, and was sentenced on April 13, 1971, to a term of life imprisonment in the Oklahoma State Penitentiary at McAlester, Oklahoma, where he is now incarcerated as Prisoner No. 82339.

Petitioner further asserts, and respondent does not deny, that petitioner filed a petition for post-conviction relief, as well as a writ of habeas corpus, in the District Court of Oklahoma County, Oklahoma, asserting the identical constitutional questions that are posed in the case at bar. Relief as alleged by the petitioner was denied on June 3, 1975. Thereafter, a petition in error and/or petition for writ of habeas corpus was filed in the Oklahoma Court of Criminal Appeals. Said court affirmed denial of relief and denied the petitioner's writ on July 3, 1975. (See [M] v. State of Oklahoma, CR-PC-75-352, unreported.) The respondent concedes that state remedies have been exhausted by the petitioner.

Petitioner contends that his conviction in CRF-70-3097 was constitutionally void because the Oklahoma Juvenile Statutes, 10 Okla. Stat. 1970 Supp. Sec. 1101, prior to the 1972 amendment, violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Petitioner relies on *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972), and for authority that the Oklahoma Juvenile Statute, supra, was unconstitutional and requests retroactive application by virtue of *Radcliff* v. *Anderson*, 509 F.2d 1093 (10th Cir. 1975).

The respondent argues that the petitioner's conviction of Murder in Case No. CR-70-3097, [*sic*] before the Oklahoma District Court, is a valid conviction and should be up-

held by this Court. The principal contention of the respondent is that the petitioner entered a knowing, voluntary plea of guilty after consulting with counsel, and this waived all procedural error involved in the Oklahoma juvenile proceedings.

At the request of counsel, this Court, on June 18, 1976, determined that final decision in this matter should be held in abeyance until certain appeals dealing with the interpretation of *Lamb* v. *Brown*, supra, and *Radcliff* v. *Anderson*, supra, were concluded. Those cases were reported at *Bromley* v. *Crisp*, 561 F.2d 1351 (10th Cir. 1977), ___ U.S. ___, *cert. denied* (Feb. 27, 1978).

The Tenth Circuit, in dealing with a fact situation almost identical to the case at bar, stated in *Bromley*, supra, at page 1361:

> ". . . the trial court reasoned that the State court's interpretation on State Law jurisdictional points was binding on the federal court; that Schaffer v. Green, 496 P.2d 375 (Okla. Crim.) had held that the void existing after the *Lamb* decision invalidated 10 O.S. Supp. 1969 § 1101(a) was filled by 21 O.S. § 152 (originally enacted in 1910); and that under the resulting state of the law, as so interpreted, all persons over the age of 14 were within the jurisdiction of the State courts for prosecution as adults, without regard to sex. Hence, it was held that releif [sic] should be denied. We cannot agree. Without doubt, the State courts are fully empowered to construe their statutes and to determine rules of State law and we must accept those determinations. However, we are faced with a substantial federal question as to whether at the time the challenged convictions were imposed there was a violation of the Equal Protection Clause by reason of disparity in treatment of male and female youths. The reality of State law as it then existed and was applied controls, and not an *ex post facto* restructuring of the

statutes. We are persuaded by the reasoning of the district court in No. 75-1830, Garner v. State of Oklahoma:

> 'The fact is, and it is undeniable, that at the time of petitioner's conviction Oklahoma did accord to girls the favored treatment. This petitioner was discriminated against by the State. There was a denial by the State of equal protection to the petitioner, and the taint of discrimination is not removed from the conviction by the retrospective view that he received all the protection he was entitled to under a proper interpretation of constitutional reality. He was entitled to equal protection. He was entitled to the same treatment as the favored class. In short, it was the treatment that he received which flaws the proceedings.' "

The Court also noted in the *Bromley*, supra, opinion, at page 1361, footnote 11:

> "Although pleas of guilty were entered in these cases, the State court considered the equal protection claim of both petitioners on the merits as in the Bromley and Rutledge cases. Hence we must reject any argument for affirmance based on the theory that the guilty pleas preclude assertion of the equal protection claim."

The *Bromley* court, supra, at page 1356, n.6, outlines the procedure which must be taken where the juvenile, as in the case at bar, was not afforded an adult certification hearing. Said note outlines the action to be taken as follows:

> "In cases where such a determination has not been made, but is necessary to dispose of a federal habeas petition, we feel it preferable that the district court withhold judgment for a reasonable time to permit the determination to be made in the State courts. See Kemplen v. Maryland, supra, 428 F.2d at 178; Booker

v. Phillips, 418 F.2d 424, 427 (10th Cir.), cert. denied, 399 U.S. 910, 90 S.Ct. 2194, 26 L.Ed.2d 564. If the State obtains in the Oklahoma courts a determination that certification would have occurred, then on a showing of such determination, the federal court should deny the writ; if the State court finding is otherwise, the writ should issue."

Accordingly, the respondent is granted 120 days from this date in which to secure a State court determination as to whether the petitioner would have been certified as an adult for State criminal prosecution. This Court, as well as the Court of Appeals in *Bromley*, supra, recognizes that State courts are unquestionably qualified because of their expertise and daily experience to make the decision as to whether adult certification should have occurred. This Court further finds that if said State court determination is not submitted within 120 days of this date, the writ will issue unless there is an extension of said time limit approved by this Court on a proper showing of good cause.

ORDERED this *13th* day of *March*, 1978.

(s) *Joseph W. Morris*
UNITED STATES DISTRICT JUDGE

APPENDIX J

[Filed June 27, 1978]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

PAUL [M], Petitioner,	)	
-vs-	)	
	)	No. 75-249-C
RICHARD CRISP, Warden, Oklahoma State Penitentiary, Respondent.	)	

NOTIFICATION OF STATE COURT ACTION AND REQUEST FOR FEDERAL HEARING

Comes now the Attorney General of the State of Oklahoma on behalf of the respondent in the above-styled and numbered case and informs the court as follows:

On March 13, 1978, this court afforded the State of Oklahoma an opportunity to conduct a hearing to determine whether the petitioner, Paul [M], would have been certified as an adult for state criminal prosecution. This office referred the matter to the District Attorney of Oklahoma County for appropriate action. An Application to Set Hearing was filed by an Assistant District Attorney. On May 23, 1978, the Honorable Harold Theus, Presiding Criminal District Judge, entered an order stating that the District Court of Oklahoma County did not have jurisdiction to review the conviction (Attachment A and B).

Pursuant to the authority of *Bromley* v. *Crisp*, 561 F.2d 1351 (10th Cir. 1977), the State is requesting this court to conduct a hearing and determine whether or not petitioner would have been certified to stand trial as an adult. It is submitted that this court is authorized to conduct the hearing, *Bromley* in Note 6 at p. 1356, to wit:

> "Further, failing a State court ruling as to whether petitioner would have been certified, then the federal

district court may have the hearing and make the ruling as to whether or not the court is clearly convinced that the petitioner would have been certified for trial as an adult, and then make proper disposition."

Counsel further advises this court that Paul [M] is no longer incarcerated in the Oklahoma State Penitentiary. As of June 3, 1977, he has been incarcerated in the Lexington Regional Treatment Center, Lexington, Oklahoma. The Warden of said institution is Mr. Peter A. Douglas. It is submitted that there should be a substitution of parties made by the petitioner.

Respectfully submitted,

LARRY DERRYBERRY
ATTORNEY GENERAL OF OKLAHOMA

(s) KAY KAREN KENNEDY
ASSISTANT ATTORNEY GENERAL
112 State Capitol Building
Oklahoma City, Oklahoma 73105

ATTORNEYS FOR PLAINTIFF

[Certificate of Mailing omitted in printing]

ATTACHMENT A

[Filed May 23, 1978]

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
-vs-	)	No. CRF-70-3097
PAUL [M], Defendant.	)	

APPLICATION TO SET HEARING

Comes now the State of Oklahoma and moves that a hearing be set in the above styled and numbered cause pursuant to the order of the Honorable Joseph W. Morris, Judge of the United States District Court for the Eastern District of Oklahoma. (Copy attached as exhibit A)

ANDREW M. COATS
DISTRICT ATTORNEY

By (s) *James P. Laurence*
Assistant District Attorney
518 County Office Building
Oklahoma City, Oklahoma

["Exhibit A" to the "Application to Set Hearing" is identical to Appendix I and is omitted here.]

ATTACHMENT B

[Filed May 23, 1978]

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
-vs-	)	No. CRF-70-3097
PAUL [M], Defendant.	)	

ORDER

On this 23rd day of May, 1978, an application to set for hearing, having been filed by the State of Oklahoma, the Court finds:

I

No action is presently pending in the District Court of Oklahoma County.

II

The District Court of Oklahoma lost jurisdiction of the subject matter once the judgment had been served in substantial part.

III

The State of Oklahoma may not invoke the jurisdiction of the District Court to review this conviction.

THEREFORE, the application to set hearing is denied.

(s) *Harold C. Theus*
PRESIDING CRIMINAL DISTRICT JUDGE

[Court Clerk's verification stamp omitted]

APPENDIX K

[Filed November 30, 1978]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

PAUL [M],	)	
Petitioner,	)	
vs	)	
	)	No. 75-249-C
RICHARD CRISP, Warden,	)	
Oklahoma State Penitentiary,	)	
Respondent.	)	

ORDER

This action comes before the Court on the request of respondent for this Court to conduct a hearing to determine whether petitioner would have been certified as an adult for state criminal prosecution.

On March 13, 1978, this Court, acting on the authority of *Bromley* v. *Crisp*, 561 F.2d 1351 (10th Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), granted respondent 120 days in which to secure a determination from state court as to whether petitioner would have been certified as an adult for state criminal prosecution. In concluding that opinion, this Court said:

> This Court further finds that if said State court determination is not submitted within 120 days of this date, the writ will issue unless there is an extension of said time limit approved by this Court on a proper showing of good cause.

Review of the record discloses that no extension of the time limit has been granted by this Court and that none has been applied for. It also appears to the Court that the time for submission of such a state court determination has expired and no such determination has been submitted.

[APPENDIX]

Accordingly, respondent is ordered to show cause within *20* days of the date of this order why the writ should not be issued forthwith.

Done this *30th* day of *November*, 1978.

(s) *H. Dale Cook*
United States District Judge

[Filed December 14, 1978]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

PAUL [M],	)	
Petitioner,	)	
vs	)	
	)	No. 75-249-C
RICHARD CRISP, Warden,	)	
Oklahoma State Penitentiary,	)	
Respondent.	)	

RESPONSE TO COURT'S ORDER

COMES NOW the Attorney General of the State of Oklahoma on behalf of the respondent in the above-styled and numbered case and in response to this Court's Order To Show Cause issued on November 30, 1978, states as follows:

As expressed in the instrument filed with this Court entitled Notification of State Court Action and Request for Federal Hearing filed on or about the 27th day of June, 1978, the State District Court ruled that it did not have jurisdiction over the subject matter because the Judgment

had been served in substantial part. The District Court of Oklahoma County further noted that the State of Oklahoma could not invoke the jurisdiction of the District Court to review this conviction. Subsequent to the entry of that Order on May 23, 1978, the petitioner did not apply to the District Court of Oklahoma County for any type of collateral relief. It is submitted that only the defendant in a criminal action (e.g. Petitioner herein) may petition the State District Court for review of the State Court Conviction. Thus, the failure of petitioner to invoke the jurisdiction of the District Court and obtain a State Court ruling as to whether he would have been certified should not preclude the State of Oklahoma from petitioning this Court for a hearing to be conducted pursuant to the guidelines in *Bromley* v. *Crisp*, 561 F.2d 1351 (10th Cir. 1977). As reflected in *Bromley*, supra, in note 6 at page 1356, the Federal District Court may have the hearing and make a ruling as to whether or not the petitioner would have been certified for trial as an adult if the State Court fails to make such a ruling. It is submitted that this action was filed prior to the *Bromley* decision and thus the State Court, when addressing the post-conviction application, did not have an opportunity to conduct a hearing such as outlined in *Bromley*. Because this action was filed prior to the *Bromley* decision and due to the fact that the State District Court has determined that the State of Oklahoma does not have standing to request a collateral proceeding at this time, it is submitted that this Court should conduct the hearing to determine whether or not the petitioner would have been certified for trial as an adult.

In the instant case the conviction which is being challenged is for murder. Petitioner received a life imprisonment sentence. The State of Oklahoma stands ready to present evidence which would clearly convince this Court that the petitioner would have been certified for trial as an adult. Respondent therefore prays this Court to follow the guidelines set forth in *Bromley* v. *Crisp*, supra, and

afford the State of Oklahoma and respondent herein an opportunity to conduct such a hearing before this Court.

Respectfully submitted,

LARRY DERRYBERRY
ATTORNEY GENERAL OF OKLAHOMA

(s) KAY KAREN KENNEDY
ASSISTANT ATTORNEY GENERAL
112 State Capitol Building
Oklahoma City, Oklahoma 73105

ATTORNEYS FOR RESPONDENT

[Certificate of Mailing omitted in printing]

APPENDIX L

[Filed June 25, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

PAUL [M], Petitioner,	)	
vs	)	
	)	No. 75-249-C
RICHARD CRISP, Warden, Oklahoma State Penitentiary, Respondent.	)	

ORDER

This action is presently before the court on the respondent's request for a hearing as to whether petitioner would have been certified as an adult for state criminal prosecution if Oklahoma's statutes regarding the definition of a "delinquent child" had been constitutionally firm in 1971, when petitioner plead guilty to a charge of murder. Also before the court is the motion of petitioner for the issuance of the Writ of Habeas Corpus originally requested.

To fully understand the issues presented, it is necessary to restate the facts of this controversy. On September 10, 1975, petitioner filed this action seeking a Writ of Habeas Corpus as well as ancillary relief under the Civil Rights Act. In the prayer, petitioner asked for immediate release from custody, expungement of his conviction and record, full restoration of his civil rights and all costs. The basis of petitioner's claim is that he should have been tried as a juvenile but was tried as an adult under a state statute, 10 Okla. Stat. 1970 Supp., § 1101, which reads as follows:

> (a) The term "delinquent child" means (1) any male person under the age of sixteen (16) years and any female person under the age of eighteen (18) years, who has violated any federal or state law or municipal ordinance, excepting a traffic statute or ordinance, or any lawful order of the court made under

> this act; or (2) a child who has habitually violated traffic laws or ordinances.

It was this statutory language that the Tenth Circuit Court of Appeals held violative of the Fourteenth Amendment in *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972), and applied retroactively in *Radcliff* v. *Anderson*, 509 F.2d 1093 (10th Cir. 1975), *cert. denied*, 421 421 U.S. 939 (1975). [*sic*] Petitioner's claim is that at the time of the alleged offense, he was seventeen years old, even though he was eighteen years old at the time of his guilty plea and sentencing.

In June of 1976, the court placed instant action in abeyance, at request of counsel, until the Tenth Circuit decided a group of cases then pending before it were decided. Specifically, those cases were expected to resolve the question of whether a minor who has plead guilty to a felony in an adult proceeding is entitled to take advantage of the *Lamb* and *Radcliff* decisions. On April 12, 1977, the Tenth Circuit decided *Bromley* v. *Crisp*, 561 F.2d 1351 (10th Cir. 1977), a group of seven cases addressing the issue before this court. In *Bromley* the Tenth Circuit stated:

> If the court is clearly convinced that the juvenile court would have certified the petitioner for treatment as an adult, we believe the essential justice and basic fairness standard of the *Radcliff* case is satisfied, without violence to the habeas remedy or State law. [6]
>
> [6] In cases where such a determination has not been made but is necessary to dispose of a federal habeas petition, we feel it preferable that the district court withhold judgment for a reasonable time to permit the determination to be made in the State courts. See *Kemplen* v. *Maryland*, supra, 428 F.2d at 178; *Booker* v. *Phillips*, 418 F.2d 424, 427 (10th Cir.), cert. denied, 399 U.S. 910, 90 S.Ct. 2194, 26 L.Ed.2d 564. If the State obtains in the Oklahoma courts a determination that certification would have occurred, then on a showing of such determination, the federal district court should

> deny the writ; if the State court finding is otherwise, the writ should issue. Further, failing a State court ruling as to whether petitioner would have been certified, then the federal district court may have the hearing and make the ruling as to whether or not the court is clearly convinced that the petitioner would have been certified for trial as an adult, and then make proper disposition.

Bromley, supra, at 1356.

In response to the Tenth Circuit's decision in *Bromley*, this court, on March 13, 1978, granted respondent 120 days to secure a state court determination as to whether the petitioner would have been certified as an adult for state criminal prosecution. In granting respondent the time to obtain a state court determination, the court said:

> This court, as well as the Court of Appeals in *Bromley*, supra, recognizes that State courts are unquestionably qualified because of their expertise and daily experience to make the decision as to whether adult certification should have occurred. This Court further finds that if said State court determination is not submitted within 120 days of this date, the writ will issue unless there is an extension of said time limit approved by this Court on a proper showing of good cause.

On May 23, 1978, the State of Oklahoma made application to the District Court of Oklahoma County for a hearing pursuant to the order of this court. That same date, Judge Harold Theus issued an order wherein he found that:

> I
>
> No action is presently pending in the District Court of Oklahoma County.
>
> II
>
> The District Court of Oklahoma lost jurisdiction of the subject matter once the judgment had been served in substantial part.

III

The State of Oklahoma may not invoke the jurisdiction of the District Court to review this conviction.

On June 27, 1978, the State of Oklahoma informed this court of the state court's decision not to determine petitioner's ability to be certified as an adult by filing a "Notification of State Court Action and Request for Federal Hearing." Subsequently, this court determined that its order of March 13, 1978 had not been complied with and ordered respondent to show cause why the writ should not issue. In its response to the show cause order, respondent stated that its request for a hearing had been denied on jurisdictional grounds and that only the defendant in a criminal action may petition the State District Court for review of the State Court conviction. The State of Oklahoma then asserted that petitioner's failure to seek the State Court ruling as to his certification should not preclude the state from seeking such a determination in this court.

Petitioner responded by alleging that the state's attempted determination of petitioner's certification was a sham. In support of this allegation, petitioner alleges certain circumstances as follows: 1) The state's "application to set hearing" filed in state court and the order signed by the judge bear the same filing stamp date of May 23, 1978—a fact petitioner suggests is indicative of a "quickie" type of hearing before the judge; 2) Both the application and order appear to have been typed on the same typewriter—indicating the state knew how the judge would rule; 3) The application for hearing was devoid of any points and authorities in support of it, such as those asserted in Bromley—indicating a possible intent by the state to lose on that issue; 4) The application, on its face, indicates that no certificate of notice was sent to petitioner or counsel—indicating that the state desired to obtain an *ex parte* ruling on its unenthusiastic request; 5) the state did not appeal

its loss in state court as it has done in every other successful *Lamb* petition arising out of Oklahoma County—further indicating a desire to lose at the state court; 6) The state concealed its loss until June 27, 1978, by which time the judge's ruling was final—indicating that the state didn't want its loss appealed; and 7) the same maneuver was accomplished on May 23, 1978, the same date, before the same judge in *Bromley* on remand from the Tenth Circuit. In the course of a conversation between Bromley's then counsel, petitioner's counsel herein, and Mr. James Laurence, the Assistanct District Attorney who had obtained Judge Theus' signature on the *Bromley* papers of May 23, 1978, it is asserted that Mr. Laurence admitted he was following the instructions of an Assistant Attorney General, that he had prepared both the application and order and had obtained Judge Theus' signature on the order with little or no discussion, and that he admitted performing the same maneuver in [M] as in *Bromley*. Counsel asserts that Mr. Laurence, in a renewed State post-conviction application, confessed the invalidity of Bromley's "Lamb" conviction and agreed to modifications on Bromley's recidivist convictions. Counsel notes that Bromley's habeas action was then dismissed as moot.

In light of the allegations made by petitioner's counsel, the court concludes that this matter should be set for hearing on the issues of (1) was the state's attempt to secure a *Bromley* type certification a good faith effort to comply with this court's order of March 13, 1978; and (2) if so, would petitioner have been certified as an adult in the 1971 proceedings. Accordingly, the matter will be set for hearing and the parties will be noticed by the clerk as to the date and hour.

ORDERED this *25th* day of *June*, 1979.

(s) *H. Dale Cook*
United States District Judge

APPENDIX M

[Filed in E. D. Okl. Sept. 18, 1979]

August 28, 1979

Honorable H. Dale Cook
Federal District Judge
Federal Courthouse
Tulsa, OK 73103

RE: [M] v. Crisp
75-249-C

Dear Judge Cook:

On August 27, 1979, I met with Jim Lawrence, Assistant District Attorney of Oklahoma County, and the Honorable Harold Theus, Oklahoma County District Judge, concerning the occurrence of events on May 23, 1978, involving the above refereneced matter.

Judge Theus was Chief Presiding Criminal Judge during the month of May, 1978. On May 23, 1978, Jim Lawrence presented Judge Theus with an Application to Set Hearing in this cause and attached as Exhibit A a copy of the Order issued by Judge Morris "granting respondent one hundred and twenty (120) days to secure a State Court determination as to whether the petitioner would have been certified as an adult for State Criminal prosecution." From my conversations with Jim Lawrence, it is apparent that Mr. Gilbert had discussed Mr. [M's] case with the Assistant District Attorney on prior occasions; but it is apparent that on May 23, 1978, Mr. Gilbert was not present in Judge Theus's courtroom at the time Mr. Lawrence submitted his Application.

Judge Theus in recalling this particular case, indicated that he refused to set the case down for hearing based primarily on the fact that there was no matter pending before the Court upon which a hearing could be held. In other words, plaintiff had not filed an application for post-

conviction relief and a mere insistence on the part of the District Attorney to set a hearing pursuant to Judge Morris's Order was not sufficient to invoke the jurisdiction of the court to proceed.

I found no indication on the part of Judge Theus or Jim Lawrence to promote a "quickie" hearing. In fact, Judge Theus maintains the position that in the event plaintiff files an application for post-conviction relief pursuant to the guidelines of *Bromley* v. *Crisp*, 561 F.2d 1351 (10th Cir. 1977) that the District Court would proceed to conduct a hearing. Judge Theus further indicated that he would be available to both you and Mr. Gilbert to support the issuance of his order on May 23, 1978.

I recently reviewed Mr. Gilbert's Motion for Issuance of Writ and Reply to "Response to Court's Order." It is interesting to note on page 7 of Mr. Gilbert's response the following statement:

> "To Mr. Lawrence's credit, he did later cooperate in undoing the harm he had done to Louis Bromley: *pursuant to a renewed State post-conviction Application in Oklahoma County . . .*" (Emphasis added)

It is clear from my discussions from Judge Theus and Jim Lawrence that Mr. Gilbert refused to file post-conviction proceedings in Mr. [M]'s case.

It is my opinion that Mr. Lawrence took the only other avenue available to him in light of Mr. Gilbert's position and in seeking compliance with this court's order to proceed within one hundred and twenty (120) days. Pursuant to Judge Morris's order, he approached the District Court in an attempt to do what Mr. Gilbert refused to do. The Court, finding no matter pending, simply denied Mr. Lawrence's request for a hearing.

In our Response to Court's Order filed on December 14, 1978, Respondent's requested a hearing to be conducted in

this court in light of plaintiff's failure to invoke the jurisdiction of the State District Court.

I am forwarding a copy of this letter to Mr. Gilbert and would reiterate our position in that the Oklahoma Criminal Appeals decision of *Edwards* v. *State*, Okl. Cr., 591 P.2d 313 (1979) affords petitioner an opportunity to present to the State District Court some valid reason to believe that certification would have been denied. This remedy was not available at the time this cause was commenced. However, it is Respondent's position that Petitioner [M] cannot avail himself of the machinery of this Court until he has exhausted *all* state remedies.

Mr. Gilbert was well aware of the States prior position that he must invoke the State District Court's jurisdiction. Any attempt on his part to assert a bad faith claim on the part of respondents will be met with strong opposition in light of his own failure to act.

If I can provide this court with additional information, please so advise.

Sincerely,

Janet L. Cox
Assistant Attorney General

JLC:pc

cc: Fred Gilbert

[APPENDIX]

[Filed January 24, 1980]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

PAUL [M], Plaintiff,	)	
v.	)	
	)	No. 75-249-C
RICHARD CRISP, Warden, Oklahoma State Penitentiary, Defendant.	)	

MOTION FOR PROTECTIVE ORDER

COMES NOW Jan Eric Cartwright, Attorney General for the State of Oklahoma, by and through Janet L. Cox, Assistant Attorney General, and on behalf of the Honorable Stewart Hunter, the Honorable Harold Theus, the Honorable Joe Cannon and the Honorable Homer Smith, District Judges in and for the Seventh Judicial District, Oklahoma County, State of Oklahoma, and pursuant to Rule 26(c) of the Federal Rules of Civil Procedure moves this Court for a Protective Order preventing the taking of their depositions in the within numbered and styled cause and further shows this Court as follows:

1. That on the 23rd day of May, 1978, the State of Oklahoma made application to the District Court of Oklahoma County for a hearing pursuant to the order of this Court.

2. Thereafter, Judge Harold Theus issued an order wherein he found that (a) no action was presently pending in the District Court of Oklahoma County; (b) the District Court no longer retained subject matter jurisdiction; and (c) the State of Oklahoma could not unilaterally invoke the jurisdiction of the District Court.

3. That counsel for Petitioner, Fred Gilbert, thereafter challenged the order of Judge Harold Theus in that

said order was not made in "good faith" but evidenced a "quickie type hearing" which operated to deprive Petitioner of a fair hearing.

4. Thereafter on June 25, 1979, this Court entered its order setting this matter down for hearing to determine (1) was the State's attempt to secure a *Bromley*-type certification a good faith effort to comply with this Court's order of March 13, 1978, and (2) if so, would Petitioner have been certified as an adult in the 1971 proceedings.

5. Subsequently, counsel for Petitioner and Assistant Attorney General Janet L. Cox conferred in chambers with this Court on or about the 2nd day of August, 1979, and determined that this matter should remain in an abated status due to the impending extended absence of counsel for military duty.

6. That in addition to an agreed abated status, the Attorney General agreed to conduct an independent investigation at the district court level to determine the merits of Petitioner's allegations; the results of said investigation are reflected in a letter to this Court dated August 28, 1979.

7. That the recent Oklahoma decision of *Edwards* v. *State*, Okl.Cr., 591 P.2d 313 (1979), affords Petitioner additional State remedies to comply with this Court's order of June 25, 1979.

8. That Petitioner's notice to take depositions of the above-named individuals constitutes annoyance, oppression and places an undue burden upon the above-named District Court Judges.

9. That three of the above-mentioned District Court Judges, namely: Homer Smith, Stewart Hunter and Joe Cannon, have not participated in the alleged "bad faith" hearing at the District Court level; and, therefore, any testimony derived would not be relevant to this action.

10. That the matters sought to be discovered by Petitioner are obtainable through other discovery methods, i.e., written interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure.

11. That Petitioner has not availed himself of the Post-Conviction Procedures of 22 O.S. § 1080 et seq., as authorized by *Edwards* v. *State*, supra, in that no action is presently pending before the District Court of Oklahoma County.

WHEREFORE, Defendants respectfully move this Court to suppress the Notice to Take Depositions filed by Petitioner on or about the 21st day of January, 1980, and to enter its order protecting the aforesaid individuals from appearing on the dates and times noted therein and for such other and further relief as this Court deems necessary.

ARGUMENT AND AUTHORITY

The authority for this Court to issue a protective order in this cause is well settled. Rule 26(c) of the Federal Rules of Civil Procedure; *Edelstein* v. *Brussell Sewing Machine Co.*, 3 F.R.D. 87 (D.C. N.Y. 1943); *Bowman* v. *General Motors Corporation*, 64 F.R.D. 62 (D.C. Pa. 1974); *Cox* v. *Fennelly*, 40 F.R.D. 1 (D.C. N.Y. 1966); and *Chemical and Industrial Corp.* v. *Druffel*, 301 F.2d 126 (6th Cir. 1962).

Further, there is no evidence to the contrary that in the event Petitioner elects to proceed in the District Court through the Post-Conviction Procedures Act that the District Court will act in an arbitrary and capricious manner.

Respondents submit that the taking of depositions by Petitioner's counsel will not be determinate of the primary issue before this Court as to whether Petitioner was properly certified as an adult; and it is clear that if in fact any bad faith existed by reason of the District Court's order of May 23, 1978, it has not operated to deprive Petitioner of

any guaranteed constitutional right rising to the level of federal intervention at this point in time.

Under such circumstances, it is submitted that the depositions of the aforementioned District Court Judges is not proper. *United States Board of Parole* v. *Merhige*, 487 F.2d 25 (4th Cir. 1973), *cert. den.*, 417 U.S. 918, 41 L. Ed. 2d 224, 94 S. Ct. 2625; *United States* v. *Northside Realty Association*, 324 F. Supp. 287 (D.C. Ga. 1971).

Respectfully submitted,

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

(s) Janet L. Cox
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112 State Capitol Building
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ATTORNEYS FOR DEFENDANTS

[Certificate of Mailing omitted in printing]